

Y4  
G 74/7  
F 31/34

9694  
G 74/7  
F 31/34

OFFICE OF FEDERAL PROCUREMENT POLICY ACT  
AMENDMENTS OF 1979

GOVERNMENT  
Storage

UMENTS

G 15 1979

FARRELL LIBRARY  
KANSAS STATE UNIVERSITY

HEARING  
BEFORE A  
SUBCOMMITTEE OF THE  
COMMITTEE ON  
GOVERNMENT OPERATIONS  
HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 3763

TO AMEND THE OFFICE OF FEDERAL PROCUREMENT POLICY  
ACT, AND FOR OTHER PURPOSES

MAY 3 AND 14, 1979

Printed for the use of the Committee on Government Operations



U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1979

47-551 O

KSU LIBRARIES  
A11900 789076

7/17/50  
48/18

DOCUMENT  
QUA

## COMMITTEE ON GOVERNMENT OPERATIONS

JACK BROOKS, Texas, *Chairman*

L. H. FOUNTAIN, North Carolina  
DANTE B. FASCELL, Florida  
WILLIAM S. MOORHEAD, Pennsylvania  
BENJAMIN S. ROSENTHAL, New York  
FERNAND J. ST GERMAIN, Rhode Island  
DON FUQUA, Florida  
JOHN CONYERS, Jr., Michigan  
CARDISS COLLINS, Illinois  
JOHN L. BURTON, California  
RICHARDSON PREYER, North Carolina  
ROBERT F. DRINAN, Massachusetts  
GLENN ENGLISH, Oklahoma  
ELLIOTT H. LEVITAS, Georgia  
DAVID W. EVANS, Indiana  
TOBY MOFFETT, Connecticut  
ANDREW MAGUIRE, New Jersey  
LES ASPIN, Wisconsin  
HENRY A. WAXMAN, California  
FLOYD J. FITHIAN, Indiana  
PETER H. KOSTMAYER, Pennsylvania  
TED WEISS, New York  
MIKE SYNAR, Oklahoma  
ROBERT T. MATSUI, California  
EUGENE V. ATKINSON, Pennsylvania

FRANK HORTON, New York  
JOHN N. ERLBORN, Illinois  
JOHN W. WYDLER, New York  
CLARENCE J. BROWN, Ohio  
PAUL N. McCLOSKEY, Jr., California  
THOMAS N. KINDNESS, Ohio  
ROBERT S. WALKER, Pennsylvania  
ARLAN STANGELAND, Minnesota  
M. CALDWELL BUTLER, Virginia  
LYLE WILLIAMS, Ohio  
JIM JEFFRIES, Kansas  
OLYMPIA J. SNOWE, Maine  
WAYNE GRISHAM, California  
JOEL DECKARD, Indiana

WILLIAM M. JONES, *General Counsel*  
JOHN E. MOORE, *Staff Administrator*  
WILLIAM H. COPENHAVER, *Associate Counsel*  
JOHN M. DUNCAN, *Minority Staff Director*

## LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

JACK BROOKS, Texas, *Chairman*

DON FUQUA, Florida  
WILLIAM S. MOORHEAD, Pennsylvania  
DANTE B. FASCELL, Florida  
FERNAND J. ST GERMAIN, Rhode Island  
ELLIOTT H. LEVITAS, Georgia

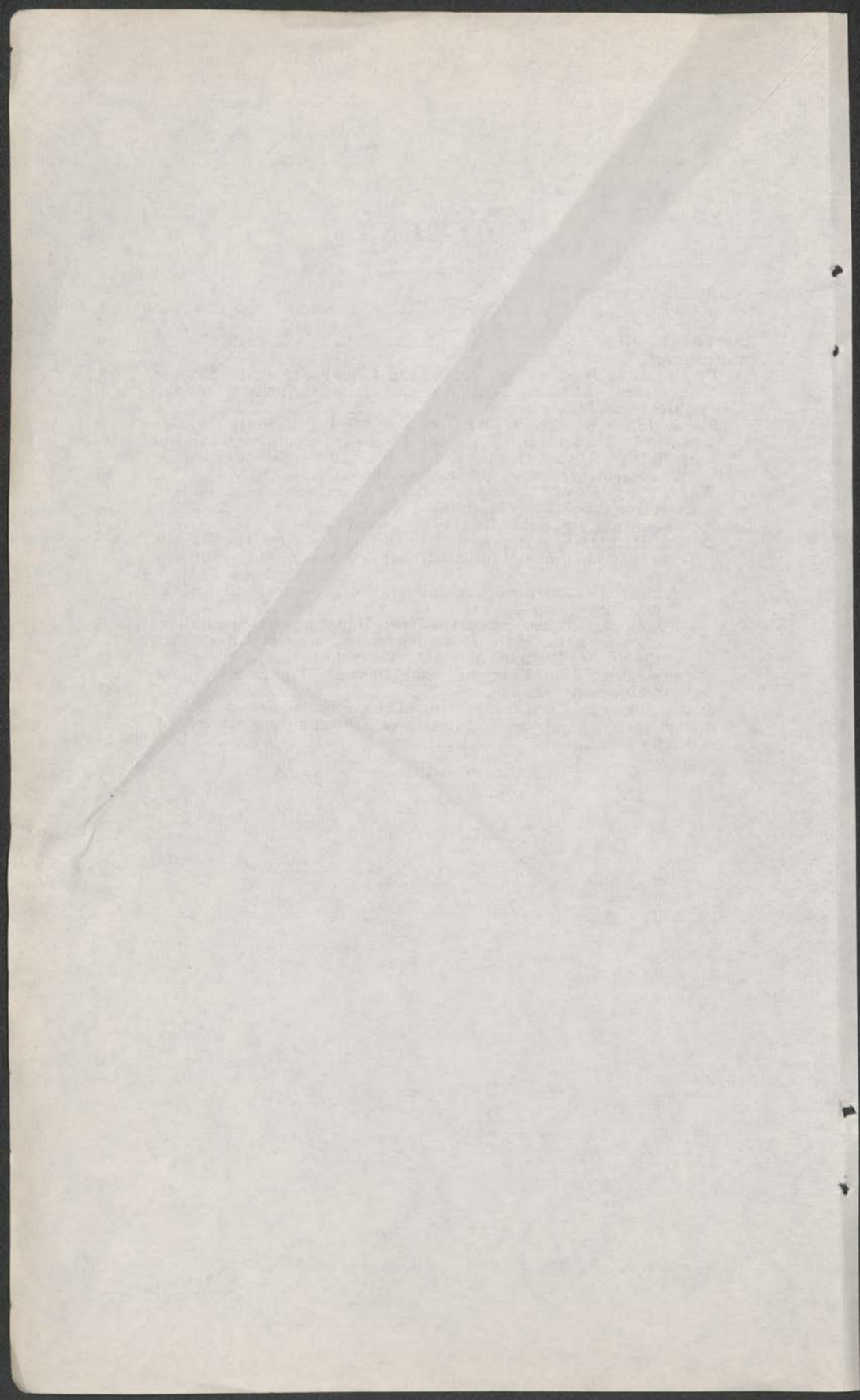
FRANK HORTON, New York  
JOHN N. ERLBORN, Illinois  
ARLAN STANGELAND, Minnesota

ELMER W. HENDERSON, *Staff Director*

## CONTENTS

Hearings held on—	Page
May 3.....	1
May 14.....	43
Text of H.R. 3763.....	3
Statement of—	
Brooks, Hon. Jack, a Representative in Congress from the State of Texas, and chairman, Legislation and National Security Subcommittee: Opening statement.....	1
Staats, Elmer B., Comptroller General of the United States; accompanied by Walton Sheley, Deputy Director, Procurement Systems Acquisition Division; and Robert B. Hall, Assistant Director, Procurement Systems Acquisition Division.....	15
White, John, Deputy Director, Office of Management and Budget, Executive Office of the President.....	44
Letters, statements, etc., submitted for the record by—	
Brooks, Hon. Jack, a Representative in Congress from the State of Texas, and chairman, Legislation and National Security Subcommittee:	
Additional correspondence and statements submitted for the hearings.....	50-98
March 19, 1979, letter from the White House concerning questions of coverage under the Davis-Bacon Act, the Walsh-Healy Act, the Service Contract Act, and related statutes and orders.....	29-35
Statement from Computer and Business Equipment Manufacturers Association.....	39-41
Staats, Elmer B., Comptroller General of the United States: Excerpt from the report of the Commission on Government Procurement, volume 1.....	19-22







## OFFICE OF FEDERAL PROCUREMENT POLICY ACT AMENDMENTS OF 1979

THURSDAY, MAY 3, 1979

HOUSE OF REPRESENTATIVES,  
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2154, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Frank Horton, John N. Erlenborn, and Arlan Stangeland.

Also present: Elmer W. Henderson, staff director; William M. Jones, general counsel, full committee; Roland Jones, clerical supervisor; E. Jean Grace, clerk; Robert Brink, professional staff member; James Lewin, professional staff member; John Duncan, minority staff director; and James McInerney, minority professional staff, Committee on Government Operations.

### OPENING STATEMENT OF CHAIRMAN BROOKS

Mr. BROOKS. The committee will come to order.

This hearing has been called to consider H.R. 3763, to amend the Office of Federal Procurement Policy Act and extend the life of that agency.

The Office of Federal Procurement Policy, located in OMB, was created by Public Law 93-400 and was given a 5-year authorization which expires September 30, 1979. It resulted from a recommendation of the Commission on Government Procurement and had as its purpose "to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws."

I favor the continuation of the work of OFPP, but as you note from the bill, I suggest that its present functions and authorizations be modified. This is the result of my study of the work of the agency during the 5 years since it was established. Judged on the basis of its accomplishments to date, OFPP has not met the goals set for it by Congress. I believe, however, it still can play an important role in formulating and carrying out an efficient and unified procurement system. The bill we are considering this morning is designed to accomplish this goal.

H.R. 3763 extends OFPP for 3 years with an appropriation of \$3 million per year. This is the figure requested by the President in his budget message to Congress.

Under the bill, the Office will develop a simplified and uniform set of procurement policies, regulations, procedures, and forms and transmit a proposal for this unified system to Congress within 1 year. The Office will analyze the Federal procurement statutes and recommend changes in the legislation to enable implementation of the uniform system. It will also design and propose a central management system to implement and enforce the uniform procurement system. It will have certain other duties such as reviewing and updating recommendations of the Commission on Government Procurement.

[The bill, H.R. 3763, follows:]

96TH CONGRESS  
1ST SESSION

# H. R. 3763

To amend the Office of Federal Procurement Policy Act, and for other purposes.

---

## IN THE HOUSE OF REPRESENTATIVES

APRIL 26, 1979

Mr. BROOKS introduced the following bill; which was referred to the Committee on Government Operations

---

## A BILL

To amend the Office of Federal Procurement Policy Act, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3                               SHORT TITLE; REFERENCE

4       SECTION 1. (a) This Act may be cited as the "Office of  
5       Federal Procurement Policy Act Amendments of 1979".

6       (b) As used in this Act, the term "the Act" means the  
7       Office of Federal Procurement Policy Act.



## POLICY, FINDINGS, AND PURPOSE

SEC. 2. (a) Paragraph (2) of section 2 of the Act (41 U.S.C. 401(2)) is amended by inserting immediately before the semicolon at the end thereof the following: “, and eliminating fraud and waste in the procurement process”.

(b) Section 3 of the Act (41 U.S.C. 402) is amended to read as follows:

## “FINDINGS

“SEC. 3. (a) The Congress finds that economy, efficiency, and effectiveness in the procurement of property and services by the executive agencies will be improved by simplifying and consolidating the procurement regulatory system.

“(b) The purpose of this Act is to establish an Office of Federal Procurement Policy in the Office of Management and Budget to develop a system of uniform procurement policies, regulations, procedures, and forms for executive agencies and to recommend changes in existing administrative and legislative requirements in order to implement that system.”.

## DEFINITION

SEC. 3. Section 4 of the Act (41 U.S.C. 404) is amended by inserting “(a)” immediately after “SEC. 4.” and by inserting at the end of such section the following new subsection:

1       “(b) As used in this Act, the term ‘procurement’ in-  
2 cludes all stages of the acquisition process, including the ini-  
3 tial definition of a need for goods and services, and the pro-  
4 curement, use, and disposition of such goods and services.”.

5                                   AUTHORITY AND FUNCTIONS

6       SEC. 4. (a) Section 6(a) of the Act (41 U.S.C. 405(a)) is  
7 amended to read as follows:

8       “SEC. 6. (a) The Administrator shall provide overall  
9 leadership in the development and implementation of pro-  
10 curement policies and the coordination of programs to im-  
11 prove the quality and performance of procurement personnel.  
12 The Administrator shall develop for submission under section  
13 8(a) a uniform procurement system which shall, to the extent  
14 he considers appropriate and with due regard to the program  
15 activities of the executive agencies, include uniform policies,  
16 regulations, procedures, and forms to be followed by execu-  
17 tive agencies (1) in the procurement of—

18               “(A) property other than real property in being;

19               “(B) services, including research and develop-  
20 ment; and

21               “(C) construction, alteration, repair, or mainte-  
22 nance of real property;

23 and (2) in providing for procurement by recipients of Federal  
24 grants or assistance of items specified in clauses (1)(A),

1 (1)(B), and (1)(C) of this subsection, to the extent required for  
2 performance of Federal grant or assistance programs.”.

3 (b) Section 6(c) of the Act (41 U.S.C. 405(c)) is amend-  
4 ed to read as follows:

5 “(c) The Administrator shall develop and propose a cen-  
6 tral management system consisting of the Office of Manage-  
7 ment and Budget, the General Services Administration, and  
8 procurement offices in executive agencies to implement and  
9 enforce the uniform procurement system described in subsec-  
10 tion (a) of this section.”.

11 (c) Section 6(d) of the Act (41 U.S.C. 405(d)) is amend-  
12 ed to read as follows:

13 “(d) The functions of the Administrator shall include—

14 “(1) reviewing the recommendations of the Com-  
15 mission on Government Procurement to determine  
16 those recommendations that should be completed,  
17 amended, or rejected, and to propose the priority and  
18 schedules for completing the remaining recommenda-  
19 tions;

20 “(2) developing a system of simplified and uniform  
21 procurement policies, regulations, procedures, and  
22 forms;

23 “(3) establishing criteria and procedures for an ef-  
24 fective and timely method of soliciting the viewpoints



1 of interested parties in the development of procurement  
2 policies, regulations, procedures, and forms;

3 “(4) promoting and conducting research in pro-  
4 curement policies, regulations, procedures, and forms,  
5 through the Federal Acquisition Institute, which shall  
6 be located within the Office and directed by the Ad-  
7 ministrator;

8 “(5) establishing a computer-based information  
9 system for collecting, developing, and disseminating  
10 procurement data which takes into account the needs  
11 of the Congress, the executive branch, and the private  
12 sector;

13 “(6) recommending and promoting, through the  
14 Federal Acquisition Institute, programs of the Office of  
15 Personnel Management and executive agencies for re-  
16 cruitment, training, career development, and perform-  
17 ance evaluation of procurement personnel;

18 “(7) developing, for inclusion in the uniform pro-  
19 curement system to be submitted under section 8(a),  
20 standard contracts and contract language in order to  
21 reduce the Government’s cost of procuring goods and  
22 services as well as the private sector’s cost of doing  
23 business with the Government; and

1           “(8) providing leadership and coordination in the  
2           formulation of executive branch positions on legislation  
3           relating to procurement.”.

4           (d) Section 6(e) of the Act (41 U.S.C. 405(e)) is  
5 amended—

6           (1) by striking out “to be authorized or prescribed  
7           by him”; and

8           (2) by inserting immediately before the period at  
9           the end thereof the following: “, through implementa-  
10          tion of the uniform procurement system”.

11          (e) Section 6 of the Act (41 U.S.C. 405) is further  
12 amended by inserting at the end thereof the following new  
13 subsection:

14          “(h) Until the effective date of legislation implementing  
15 the uniform procurement system, the Administrator may,  
16 with the concurrence of the Director of the Office of Manage-  
17 ment and Budget, issue policies to ensure that the promulga-  
18 tion of policies, regulations, procedures, and forms by execu-  
19 tive agencies is consistent with and in support of the develop-  
20 ment and implementation of the uniform procurement  
21 system.”.

22                               RESPONSIVENESS TO CONGRESS

23          SEC. 5. (a) Section 8(a) of the Act (41 U.S.C. 407(a)) is  
24 amended to read as follows:

1       "SEC. 8. (a)(1) The Administrator shall keep the Con-  
2 gress and its duly authorized committees fully and currently  
3 informed of the major activities of the Office of Federal Pro-  
4 curement Policy, and shall submit a report thereon to the  
5 House of Representatives and the Senate annually and at  
6 such other times as may be necessary for this purpose.

7       "(2) At the earliest practicable date, but in no event  
8 later than one year after the date of enactment of the Office  
9 of Federal Procurement Policy Act Amendments of 1979,  
10 the Administrator shall transmit to the House of Representa-  
11 tives and the Senate his proposal for a uniform procurement  
12 system. Such proposal shall include a full description of the  
13 proposed system, projected costs and benefits of the system  
14 as proposed, and short- and long-term plans for implementa-  
15 tion of the system, including schedules for implementation.  
16 At the same time, the Administrator shall transmit a report  
17 on the recommendations of the Commission on Government  
18 Procurement specified in section 6(d)(1) of this Act.

19       "(3) At the earliest practicable date, but in no event  
20 later than one year after presentation of the proposal de-  
21 scribed in subsection (a)(2) of this section, the Administrator  
22 shall propose to the House of Representatives and the Senate  
23 recommended changes in legislation relating to procurement  
24 by executive agencies. If the Administrator deems it neces-  
25 sary, these recommendations shall include a proposal for a



1 consolidated statutory base for procurement by executive  
2 agencies.

3       “(4) At the earliest practicable date, but in no event  
4 later than the submission of the legislative recommendations  
5 described in paragraph (3) of this subsection, the Administra-  
6 tor shall present a proposal for a management system de-  
7 scribed in section 6(c) to implement and enforce the uniform  
8 procurement system.”.

9       (b) Section 8 of the Act (41 U.S.C. 407) is further  
10 amended—

11           (1) by striking out “any major policy or regulation  
12 prescribed under section 6(a)” in subsection (b) and in-  
13 serting in lieu thereof “any policy prescribed under  
14 section 6(h)”;

15           (2) by striking “or regulation” each place it ap-  
16 pears in such subsection; and

17           (3) by striking out “any major policy or regula-  
18 tion” in subsection (c) and inserting in lieu thereof  
19 “any policy”.

20           EFFECT ON EXISTING REGULATIONS

21       SEC. 6. Section 10 of the Act (41 U.S.C. 409) is  
22 amended to read as follows:

23           “EFFECT ON EXISTING REGULATIONS

24       “SEC. 10. Procurement policies, regulations, proce-  
25 dures, or forms in effect as of the date of enactment of the

1 Office of Federal Procurement Policy Act Amendments of  
2 1979 shall continue in effect, as modified from time to time,  
3 until repealed, amended, or superseded pursuant to the adop-  
4 tion of the uniform procurement system described in section 6  
5 of this Act.”.

6 AUTHORIZATION OF APPROPRIATIONS

7 SEC. 7. Section 11 of the Act (41 U.S.C. 410) is  
8 amended—

9 (1) by striking out the first sentence and inserting  
10 in lieu thereof the following: “There are authorized to  
11 be appropriated to carry out the provisions of this Act,  
12 and for no other purpose, \$3,000,000 for the fiscal  
13 year ending September 30, 1980, and for each of the  
14 two succeeding fiscal years; and one-third of the funds  
15 appropriated for any such fiscal year shall be made  
16 available to the Federal Acquisition Institute for the  
17 performance of its functions under this Act.”; and

18 (2) by striking out “Government Operations” in  
19 the second sentence and inserting in lieu thereof “Gov-  
20 ernmental Affairs”.

21 DELEGATION

22 SEC. 8. Section 12(a) of the Act (41 U.S.C. 411(a)) is  
23 amended by striking out “direction of Federal procurement  
24 policy and to prescribe policies and regulations to carry out

1 that policy" and by inserting in lieu thereof "leadership in  
2 the development of Federal procurement policy".

3 ACCESS TO INFORMATION

4 SEC. 9. Section 14(b) of the Act (41 U.S.C. 412(b)) is  
5 amended by striking out "establishing" and inserting in lieu  
6 thereof "developing".

7 CONFORMING AMENDMENTS

8 SEC. 10. (a) Sections 201(a)(1), 201(c), and 206(a)(4) of  
9 the Federal Property and Administrative Services Act of  
10 1949 (40 U.S.C. 481(a)(1), 481(c), 487(a)(4)) are each  
11 amended by striking out "subject to regulations" and insert-  
12 ing in lieu thereof "subject to policies".

13 (b) Section 602(c) of the Federal Property and Adminis-  
14 trative Services Act of 1949 (40 U.S.C. 474(c)) is amended  
15 by striking out "except as provided by the Office of Federal  
16 Procurement Policy Act, and".

17 EFFECT ON OTHER LAW

18 SEC. 11. The provisions of the Act as amended by this  
19 Act shall supersede the provisions of section 222 of the Act  
20 of October 24, 1978, entitled "An Act to amend the Small  
21 Business Act and the Small Business Investment Act of  
22 1958" (41 U.S.C. 405a) to the extent they are inconsistent  
23 therewith.



1

## EFFECTIVE DATE

2

SEC. 12. The amendments made by this Act shall take

3

effect on October 1, 1979.

Mr. BROOKS. We had invited the Office of Management and Budget to appear before us, but they were unable to make it.

The work of this agency has been closely followed by the General Accounting Office, and we have asked the distinguished Comptroller General to appear before us this morning to give us his views on the legislation.

Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

The Commission on Government Procurement was created in November 1969, to study and recommend to Congress methods to promote the economy, efficiency, and effectiveness of procurement by the executive branch. I spent 2½ years on the Commission studying the causes of and recommending reforms to eliminate waste in the \$100 billion annual Federal purchasing budget.

The Commission made 149 recommendations in its 1972 report to improve Federal Government procurement. The creation of an Office of Federal Procurement Policy was the first recommendation and the most important recommendation of the Commission.

The Commission found that there was no one place in the Government where business, State and local governments, and Federal agencies could go on matters of Government-wide procurement policy. No agency had ever taken charge. Each agency went its own way without paying attention to what the other agencies were doing.

As a member of the Procurement Commission, I supported the recommendation to create an office to bring some order to this chaos. As a sponsor of the legislation which created the Office of Federal Procurement Policy, I tried to make certain that it would work and that it would have the tools to do its job.

The Office was created to be the focal point of Federal procurement policy. It was to provide in one office special competence and leadership in Government-wide procurement. Congress, industry, small businessmen, private citizens and the executive agencies would have one place to go on procurement policy issues. OFPP was given an important and difficult job to do. Its purpose is to simplify Government policy, not to create a whole new set of rules. It is supposed to bring sense to the way in which the Government spends \$100 billion a year.

Today we will begin consideration of a bill, H.R. 3763, which would constrain OFPP's authority, giving it the responsibility to develop a simplified and uniform set of procurement policies, regulations, procedures, and forms; second, to analyze the Federal Government's procurement statutes and recommend legislative changes to implement the uniform procurement system; third, to design and propose the central management system to implement and enforce the uniform procurement system.

I am pleased that we have with us today Comptroller General Staats. I have had the privilege of working with Elmer Staats for



many years. I have had great admiration for his leadership and dedication.

We served together on the Commission on Federal Paperwork and also on the Procurement Commission. Mr. Staats has always been one of the most hard working and perceptive members of the commissions that I have served on, and he brings these qualities to every task that he performs.

I must say at the outset that I am quite concerned over the idea of suspending for 3 years OFPP's overall directive authority. I am afraid that what is taken away on a temporary basis may never be restored. So, it behooves us to pay serious attention to this matter before we act.

I know, Mr. Staats, that your Office has followed this matter very closely and that you are very much personally interested in the problems of procurement. I know, also, that the GAO has just completed a major study of the status of the Procurement Commission's recommendations. So, I especially respect your views, look forward to your views on this and on this reauthorizing legislation.

I join the chairman in welcoming you to this hearing this morning.

Mr. Brooks. General Staats has had a long and fruitful career in Government and has achieved a national reputation as the principal watchdog of Federal expenditures.

General Staats was born in Richfield, Kans., and did his undergraduate work at McPherson College, after which he got a master's degree from the University of Kansas and a Ph. D. from the University of Minnesota.

He joined the Bureau of the Budget—now the Office of Management and Budget—in 1939 and served in different capacities until 1953. He left the Bureau, to return as Assistant Director in 1958. He was elevated to Deputy Director in 1959 and served in that position until 1966, when he was appointed Comptroller General of the United States by President Lyndon B. Johnson.

He is a member of numerous professional and civic associations, among them the American Society for Public Administration, of which he was national president in 1961 and 1962. He has received many honorary degrees and awards, including a doctor of laws from his alma mater, and more recently from Duke University in 1975.

General Staats is married to a beautiful wife and is the proud father of three children.

We are delighted to have you back before the committee, General.

**STATEMENT OF ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES; ACCOMPANIED BY WALTON SHELEY, DEPUTY DIRECTOR, PROCUREMENT SYSTEMS ACQUISITION DIVISION; AND ROBERT B. HALL, ASSISTANT DIRECTOR, PROCUREMENT SYSTEMS ACQUISITION DIVISION**

Mr. STAATS. Thank you, Mr. Chairman.

To my right is Walton Sheley, who is the Deputy Director of our Procurement Systems Acquisition Division. To my left is Robert Hall, who is associated with Mr. Sheley in that Division.



Mr. Chairman, I have a brief statement which I would like to read, if I may. As both you and Congressman Horton have indicated, I have had a long interest in this subject, both as a Comptroller General and as a member of the Procurement Commission.

We in GAO devote a great deal of our resources to the procurement area of the Government. One of the problems that we have had historically is that there has been no place that we could go to in the executive branch for leadership in policy matters which need attention.

I am glad to be here this morning to present our views on H.R. 3763, which would continue the Office of Federal Procurement Policy.

Your bill would not alter the original goal of establishing this policy leadership but would alter how that goal is to be achieved.

The bill would shift the primary emphasis for the next 3 years from one of policy direction to one of leadership in policy development. Instead of establishing and prescribing policy and regulations for the Federal agencies, OFPP's role for the near future would be to develop a uniform procurement system to be implemented by the Congress.

I am concerned about the general thrust of the bill which would take away from OFPP overall directive authority over procurement policies, regulations, procedures, and forms. As you know, I was a member of the Procurement Commission, and it was the unanimous position of the Commission that there was a void in policy leadership and responsibility in the procurement area. The report stated that many problems found by the Commission were attributed—at least in part—to the lack of a central executive branch leadership in developing policies and effective implementation of policies.

The Commission recommended, among other matters, that the OFPP have directive authority rather than merely advisory authority.

If directive authority is taken away from OFPP, there is no one to fill the gap, and the Government would again be in a situation where each department and agency would be making its own decisions with respect to overall procurement policy.

Perhaps one way to mitigate the concerns over the loss of directive authority would be to require that all directives issued by OFPP be concurred in by the Director of OMB before issuance. This would help clarify the roles of the two organizations which in the present law is unclear. Section 6(h) may be intended to achieve this. However, we think it is limited in that policy issuances would be confined to those necessary to achieve consistency with and in support of the development and implementation of the uniform procurement system.

I would like to comment now on what we consider the most positive aspect of the bill. Previous OFPP Administrators, as well as the regulatory system—which is known as the FAR—now being developed were and still are constrained by existing legislation. As we understand your proposal, Mr. Chairman, the new Administrator would have the opportunity, and indeed the obligation, to develop the kind of a procurement system in the Federal Government needed for the future. The Administrator would then come to Congress for policy review and backing through new legislation.

The Procurement Commission's opening remarks in its report, "Blueprint for Action," list 10 important elements of a procurement system. This blueprint is attached to my statement in the event it can be useful in clarifying the term "procurement system."

Combined with the creation of a procurement system unconstrained by existing legislation is the broad interpretation of procurement embodied in the bill from defining the need to the ultimate disposition of goods and services. If interpreted in this manner, we believe this combination of issues presents a tremendous challenge of the OFPP. We question whether it would be able to meet the 1-year timetable in the bill. Of course, you may wish to get the OMB's judgment on this matter.

The bill adds a number of matters not in the original OFPP Act. We can support them based on our various followup studies of the past several years.

For example, H.R. 3763 will strengthen OFPP's leadership in developing a professional workforce in Federal procurement and, at the same time, make the Federal Acquisition Institute an integral part of OFPP where it can take on a Government-wide character. This, we think, would be a very constructive step.

The bill would also encourage the Institute to undertake much more research and experimentation for improving procurement practices. This too has been supported by us in a separate report as well as in our recent Senate testimony on this same matter. The assurance of funding for the Institute is also desirable.

The bill adds an OFPP function of legislative leadership in procurement matters. We think this is a good idea in view of the major legislative changes that are likely to emerge from OFPP's work and still open legislative recommendations of the Commission.

The bill would elevate to a statutory level OFPP's job of considering and taking action on the recommendations of the Procurement Commission. Our current report supports giving higher priority to systematic followup on the Commission's report.

It has been more than 6 years since the Commission submitted its recommendations, but the followup program has a long way to go. The current status of the Commission's 149 recommendations is as follows: 13 have been rejected; some 30 have been accepted and implemented—for a total of 43 that have been disposed of. But there still remain some 106 on which action is incomplete; 13 of them not accepted or rejected, and some 93 which have been accepted and implementation is in process.

In an upcoming report, we will attempt to assess the status of and possible action on the 106 recommendations where action is incomplete. This is a matter of judgment, but it is the judgment of staff who have been following this very closely. We think that 19 of them have a good chance, 42 have a fair chance, and 45 have a poor chance of being acted upon.

If there is to be a major shift in OFPP's role over the next 3 years, legislative intent must, of course, be clear.

We would like to make four suggestions:

First, the terms used in the bill "uniform procurement system" and "management system" should be clearly spelled out because they would be the OFPP's main objectives for the next 3 years. For example, what would comprise the entire system and should all of it be embodied in the executive proposal to the Congress? You may wish to define



these terms in the bill or in the legislative history. The point we are making is that we do not think there should be doubts about what outcomes are expected both from OFPP and in its submittals to the Congress. We will be very happy to work with you and members of your staff on this problem.

Second, the bill requires that OFPP submit a report to Congress on the recommendations of the Commission on Government Procurement. You may be aware that we have had problems with OFPP's past reporting on this subject—both its internal status reports as well as its annual reports to Congress. More needs to be known about status, progress, obstacles, shortfalls, and actions scheduled on each open recommendation. Present OFPP reports, offer no handles for the Congress and others to give help, nor do they satisfy the analysis, evaluation, and review oversight Congress wants as expressed in OFPP's legislative history.

Its latest annual report to the Congress, for example included only a one-page statistical summary. Periodic internal status reports serve as a foundation for OFPP's statistical summary.

These reports contain some premature assessments that implementation of recommendations is complete. They include target dates that move frequently with no indication of original dates or reasons for delay. They do not show the multiple actions required by some recommendations. They do not identify incremental tasks required to carry out accepted recommendations.

Our upcoming report contains an alternative reporting framework, and we hope it will be helpful in carrying out this part of the bill and any guidance the Congress may wish to include in legislative history.

This report, by the way, that we are working on we hope to have before you by the end of this month.

Third, section 6(b) of the bill establishes a role for GSA in the central management system ultimately to be adopted. In view of GSA's past track record, coupled with the probable objection of the Defense Department to GSA's monitoring DOD procurement activity, you may wish to illustrate in legislative history the kind of role GSA might be expected to play in the central management system.

Finally, the bill has a life of only 3 years within which, as we said earlier, a tremendous job has to be done. We would encourage extending OFPP for 5 years, with an annual progress report on which hearings might be held. This longer period of authorization could be especially important to attract and retain a higher caliber staff.

In addition, once OFPP completes its policy development role as envisioned in this bill, it is important that Congress respond to OFPP's proposals—the procurement system, the new legislation, and the management system—in a timely manner.

This concludes our prepared statement. With your concurrence, I think the attachment might be useful to have inserted in the record as a part of my statement.

Mr. BROOKS. Without objection, it will be inserted in the record.  
[The material follows:]



REPORT  
OF THE  
COMMISSION  
ON  
GOVERNMENT  
PROCUREMENT

VOLUME 1

DECEMBER 1972

## BLUEPRINT FOR ACTION

As may be gathered from the foregoing discussion, Government procurement is more than a purchasing function. It is affected by a wide range of Government needs influenced by numerous social, political, and economic activities—all of which act and react on each other. The Commission tried to identify the principal problem areas and the concerns of Congress, the public, and the procurement community itself. We outline now the direction of our proposals for improving the process in accordance with the mandate of Congress.

## Policy Goals

The law establishing this Commission declares it "to be the policy of Congress to promote economy, efficiency, and effectiveness" in the procurement of goods and services by the executive branch.\* The methods for achieving this policy are spelled out in the law. Essentially, the law calls for (1) the reevaluation and improvement of policies for the Government to acquire goods and services in a timely, economical, and competitive manner; (2) an improvement in procurement organization and personnel; (3) the correction of duplication or gaps in laws, regulations, and directives; (4) uniformity and simplicity when appropriate; (5) fair dealing; and (6) overall coordination of Federal procurement programs.

Recommendations are contained throughout the four volumes of our report. Clearly, not all are of equal importance or of similar impact. Some call for a fundamental recasting of the procurement process; others for alleviating ills that have plagued Government and industry. Taken together, the major recommendations will achieve the policy goals set forth in the congressional mandate establishing the Commission.

## An Integrated System with Central Leadership

An important objective of our recommendations is to ensure that the system fully warrants the public trust. The recommendations propose an integrated system for effective management, control, and operation of the Federal procurement process. The focus of this system is the proposed Office of Federal Procurement Policy that, if established, will provide leadership in the determination of Government-wide procurement policies.

The system we advocate will enable the executive branch to ensure that procurement operations are businesslike and orderly and that goods and services are efficiently acquired. To carry out this responsibility, Federal purchasing agencies must be provided with necessary instructions and resources. Another essential

ingredient is timely information on how well procurement needs are being met, so that deficiencies and resources may be adjusted at the appropriate management level. Our system satisfies these criteria and represents the net result of our study. The ten elements of our system are:

- The creation of an Office of Federal Procurement Policy in the executive branch to assure fulfillment of Government-wide statutory and executive branch requirements in performing procurement responsibilities.
- An integrated statutory base for procurement, implemented by a Government-wide regulatory system, to establish sound policies and simplified agency procedures to direct and control the procurement process.
- Latitude for Federal agencies to carry out their responsibilities within the framework of Government-wide statutes, policies, and controls.
- Availability of funds in time to permit improved planning and continuity of needed Federal and contractor operations.
- Government-wide recruitment, training, education, and career development programs to assure professionalism in procurement operations and the availability of competent, trained personnel.
- Carefully planned agency organizations, staffed with qualified people and delegated adequate authority to carry out their responsibilities.
- A coordinated Government-wide contract administration and audit system. The objective is to avoid duplication and deal uniformly, when practical, with the private sector in the administration of contracts at supplier locations.
- Legal and administrative remedies to provide fair treatment of all parties involved in the procurement process.
- An adequate management reporting system to reflect current progress and status so that necessary changes and improvements can be made when the need appears.
- A continuing Government-wide program to develop better statistical information and improved means of procuring goods and services.

\* See sec. 1, Public Law 91-129 (Appendix A).



## The Role of Leadership

As we have examined the management of the procurement process, we have been repeatedly drawn to the conclusion that a process of such central importance demands continuing, thoughtful attention by the leaders in Government. No capable executive in the private sector or in the Government can afford to ignore the significance of his purchasing operation when organizational success depends largely on effective contracting. This is particularly true of the Government's purchasing function because of the broad social, political, and economic implications of Government spending.

All too often we see the ill effects of the lack of an executive branch mechanism that can focus Government-wide attention on the impact of procurement on costs and efficiency. For example, attempts to achieve uniformity in interagency policy often go unheeded and become compounded by management-level neglect or by isolated congressional actions. Similarly, our studies show that social and economic goals attached to the procurement process involve needlessly cumbersome administrative procedures. Controversies over how best to proceed are often relegated to low-level interagency haggling rather than being dealt with expeditiously by top management.

The improvements we recommend in organization, personnel capabilities, policies, and procedures, together with the other elements of the integrated system just described, would considerably improve the procurement process—but more is needed. Without strong

leadership, understanding, and effort by top management in both the legislative and executive branches, the procurement process will not be a strong mechanism for accomplishing national goals.

## A Concluding Thought

The complexity of procurement is such that mistakes will be made even by people dedicated to doing a quality job. The important thing is to learn from the mistakes and continually improve the process. There are no universal answers to the myriad operating problems of Government procurement and the many goals it supports. However, if the recommendations advanced in this report receive effective and timely implementation, measurable improvement should result in the short term and even greater improvements should result over the long term.

The Commission has not attempted to make an estimate of the savings which could be achieved through the adoption of its recommendations. Indeed, it would have been impossible since many of them are in the nature of policy changes for which estimates could not be made with any degree of precision. At the same time, the Commission is certain that substantial savings can be made and has so indicated at many points in its report. For example, one recommendation alone—increasing from \$2,500 to \$10,000 the limit on exemptions from using advertised procurement procedures for small purchases—would save approximately \$100 million.

Mr. BROOKS. Thank you very much, General. We appreciate very much your careful analysis of this legislation and your thoughtful suggestions. We will take them under advisement. I am sure they will be helpful to us as we try to reach a decision on this bill.

I do want to point out that the upcoming report that you hope to have in a month might not be as much help to us as it could otherwise be if we could get it very shortly. If it is not ready now, I would hope that maybe our staff could informally discuss with your staff the preliminary recommendations before you finalize it. We are under a time pressure.

Mr. STAATS. I believe arrangements have been made, Mr. Chairman, to do exactly that.

Mr. BROOKS. Then you could finalize your report. But, if you have any really good ideas in it that we might find useful, you ought to pass them on to us now.

Mr. STAATS. I fully agree.

Mr. BROOKS. At the request of this committee, the GAO has been reviewing the executive branch implementation of the recommendations of the Commission on Government Procurement. Would you give us a brief assessment of OFPP's performance in that area?

Mr. STAATS. I suppose we would have to say it is kind of a mixed bag, Mr. Chairman. There has been some useful work done. A lot of groundwork has been established. But, overall, we feel there is a lot to be done here.

Mr. Sheley and Mr. Hall here have been working particularly on the report that I mentioned. I think it would be helpful to have their response on this as well.

Mr. BROOKS. Mr. Sheley?

Mr. SHELEY. One of the things, Mr. Chairman, we have noticed is the somewhat uncertain future that has clouded the issue of how far they can go. But there have also been some activities where OFPP has gone outside the realm of what we consider to be their regular charter. I think this has diluted and diverted them from their principal purpose. I am speaking principally of their efforts in the anti-inflation area, their argument with the Labor Department over the Service Contract Act and the Davis-Bacon Act. It has consumed a lot of energy.

Those two things, I think, are areas that they did get into that we felt did divert and dilute their activities. We are not pleased with the progress, let us say, in some of the areas, particularly implementation of the Commission recommendations. We will be commenting on that in our report.

Mr. STAATS. I think there has been some uncertainty internally, Mr. Chairman, growing out of, in part, an earlier proposal which I believe has now been abandoned by the President's reorganization project, which would have modified the OFPP's structure. I believe that is now behind us.

I think the point that Mr. Sheley refers to with respect to getting into areas which were not contemplated by the Commission—were dealt with pretty directly in a recent opinion of the Attorney General to the President. The issue was raised as to the extent to which OFPP had authority to deal with problems like the Davis-Bacon Act and the Service Contract Act.



The Attorney General ruled that they did not have that authority. In rendering this opinion, the Attorney General quoted at length on my testimony before the Congress which established the OFPP. It was my interpretation—which I think was clearly documented—that the Commission did not intend that the OFPP have that kind of directive powers where other statutes govern. That matter now, I believe, has been resolved and resolved in a way which I believe is strictly and fully in accord with the Procurement Commission's views.

Mr. BROOKS. They do not seem to have been too fast in really accomplishing their purposes. To what would you attribute their kind of lethargy over there and lack of direction that seems to be evident?

Mr. HALL. I would be glad to add some more material to what Mr. Staats and Mr. Sheley have said. The reasons for slow progress fall into two categories, legitimate reasons, and others that are not.

In the legitimate category, you have the complexity of some of the issues. You also have the difficulty in orchestrating Government-wide change—no easy task. And then, some of the recommendations require multiple actions. OFPP to come to Congress for legislation. There has to be regulation. Then there has to be reorientation of the people.

On the other side of the coin, quite a few of the recommendations have taken on a low priority for the reasons that Mr. Staats and Mr. Sheley mentioned: the diversion to other tasks.

Then there has been the absence of a legislative program. However, your bill would correct that. There needs to be legislative leadership.

Then OFPP has been in somewhat of a reactive mode. There has been a tendency not to resolve tough issues, to come over here and sit down with you face to face and deal with some matters that require good communication and good resolution between the two branches. You might say there is some fear, maybe, here of reprisal perhaps in taking on some tough issues with Congress.

I think that pretty well covers it, except for the visibility problem that Mr. Staats mentioned in reporting. There has been low visibility and low accountability. You cannot tell much from their reporting to the Congress and to themselves. Their own Administrator has not had good reporting. Therefore, we have had not enough visibility on the progress.

Mr. BROOKS. Would you say in your assessment of the problems associated with their procurement reform program that the major deficiencies would be in the area of failure to develop needed legislation and failure to establish proper priority and failure to assume the kind of leadership that they should have and a failure to maintain accountability?

Mr. HALL. Yes, sir.

Mr. BROOKS. Plus the ones you just mentioned.

Mr. HALL. Yes, sir. I said those things in somewhat different terms.

Mr. BROOKS. I want to assure you that, if this project is continued, they are going to be a little more visible; and I am going to try to make them a little more accountable.

Mr. STAATS. Mr. Chairman, I think it should be pointed out here that there have really been more initiatives in the Congress on carrying out some of the legislative changes contemplated by the Commission than there has been from the executive branch. The Contract Disputes Act, for example, which is now on the statute books, was not proposed by OFPP; that originated here in the Congress.



We feel your idea of requiring them to submit a legislative program—there are many of the recommendations of the Procurement Commission that cannot be acted upon except by changes in the legislation. There are a number of them: patent policy, independent research and development, et cetera. There are a whole host of recommendations of that type.

Mr. BROOKS. General, do you think it is possible to develop a truly simplified uniform procurement regulatory system without substantial changes to existing statutes?

Mr. STAATS. No, you cannot. I think the Commission understood that point, too.

Mr. BROOKS. Do you mean that the OFPP's current effort to develop a Federal acquisition regulation—which is supposed to be ready fairly shortly—will not meet the requirements for a uniform procurement system?

Mr. STAATS. Well, it goes part way. But you cannot, through a single Federal acquisition regulation, cover all the points in the Commission's report. Obviously, they will have to come to Congress for authority. But it is a move in the right direction. We applaud that. But you cannot do the whole thing through a Federal acquisition regulation.

Mr. BROOKS. In your opinion, why have the OFPP's resources and attention been diverted from its primary mission, as you pointed out earlier, especially in those areas where it has questionable authority to act? Why did that happen? What do you think about it?

Mr. STAATS. I can only make some assumptions here because, obviously, I would not be privy to all the facts. I suspect that there were pressure in connection with the anti-inflation program for them to become involved. It would be very understandable that that would happen.

We rendered a legal opinion at the time that they were involved in this saying that, in our opinion, they did not have legal authority to debar procurement from contractors who did not adhere to the price-wage guidelines. But, nevertheless, they proceeded with that effort. They have also been working with State and local governments on the anti-inflation program.

But I am not sure that I would have all the facts to answer your question beyond that.

Mr. BROOKS. The Procurement Commission said that the Federal policy and the Government's reliance on the private sector should be set by Congress. But the OFPP decided that no legislation was necessary, and they went on and issued that A76 policy.

What is your view of OFPP's action in this matter? Do you support the Commission's recommendation that this policy should be legislatively mandated?

Mr. STAATS. We fully support what was in the Commission report; namely, that this should be a matter for legislative decision. Anticipating that OFPP might come to Congress with recommended legislation, we undertook a review in GAO. We have now issued a report.

I guess our disagreement essentially is on two points. One is, we felt that it should be a statutory matter.

The other is, with respect to the cost comparisons, they use what is called a fully allocated cost. We, in line with the Procurement Commission's recommendations, use an incremental approach unless the new start—as it is called—involved a very major change in the program.

This can make a substantial difference, but it is precisely the kind of an issue that I think Congress should pass on rather than OFPP assuming what they call now a national policy. I do not know how you can have a national policy where the Congress does not have a part to play in it.

Mr. BROOKS. Public participation and congressional review are two of the basic tenets of OFPP's enacting legislation. The legislative history indicates that Congress sought to rely primarily on these mechanisms to provide effective control of their broad authorities. Do you feel that those controls have worked?

Mr. STAATS. I guess an answer has to be somewhat yes and no.

The participation has been in the form of the Federal Register publication.

It was our view—and I believe this is in line with the Commission's report—that participation has to take place in a variety of different ways. There needs to be strong interface with the private section here. I do not believe it can be done entirely through publication in the Federal Register.

In general—and I believe our report will support this—we feel that there has not been adequate public participation in the process.

Mr. BROOKS. There are times when Congress does not wait for reports from the executive branch to act on correcting deficiencies in agency programs. Such was the case when the conference report covering OFPP's fiscal year 1979 budget directive that the Federal Acquisition Institute, created by OFPP under the management of DOD, be moved from the Defense Department back to the OMB. The basis of this direction was the belief, the conviction, that the location of the Institute in the DOD had greatly reduced its effectiveness as a Government-wide institution.

As you know, General, this congressional directive is being ignored by the executive agencies. The Defense Department continues to be the Federal Acquisition Institutes' executive agent.

What is your assessment of the effectiveness of this Institute in terms of its primary functions of procurement, research, and education?

Mr. STAATS. I think that Congressman Horton would support me in the view of the Commission. We had very extensive discussions on the need for a strong training program. One of the ways that you get better performance, lower cost in the goods and materials, and systems that the Government procures is by having better trained people. There is a lot that can be learned from the private sector on how to buy and how to manage materials and equipment purchased.

We have been disappointed with what we consider to be a fairly low priority which has been established for the Federal Acquisition Institute. It is located down at Cameron Station, which is not a very good location. It is unclear as to whether it is going to have funds from year to year.

It is very difficult to recruit good staff. The tendency has been to bring staff in almost entirely out of the Defense Department.



We would like to see its status elevated. We would like to see it much more involved with the educational community. There have been some recent efforts along those lines. I do not want to be completely negative. But, thus far, it has had a too low priority.

Perhaps one thing that could be done would be to—instead of having the Defense Department as the executive agent, it might be done in conjunction with an educational institution that has a strong background in the field of public management and business management. That is a possibility that might have some promise.

It needs to be given a Government-wide status rather than, apparently, a status which is more identified with the Defense Department.

Mr. BROOKS. Counsel points out, as you may have noted in the bill on page 9, that it directs that one-third of the funds would go to the Federal Acquisition Institute. It would give them an assurance of a piece of the pie.

Mr. STAATS. I should have mentioned that. We do support that.

Mr. BROOKS. I hope we do not give it all to the Defense Department. They have \$130 billion, and they are good at spending money. But, at saving money, they don't know the word. If they are in charge of saving money, we are in real trouble.

No comment required on your part.

General, in your statement, you express some concern about taking away OFPP's overall directive authority over procurement policies—although you do point out that, in section 6(h), there is a limited provision for the issuance of policy directives with the concurrence of the Director of the OMB. That would give it more authority and more punch, more credibility.

Would your reservation about this provision be solved if the OFPP were to retain the full authority with the concurrence of the Director of OMB to issue policies in accordance with applicable laws until a new uniform procurement system is acted on by the Congress?

Mr. STAATS. I think that would take care of our concern.

There are two points here. One is that it is unclear now—and I believe Mr. McIntyre would support this statement—as to what his responsibility is vis-a-vis the head of OFPP. There is always a question of what is a budgetary matter and what is an overall organization matter. To try to draw a line between what is the OMB Director's responsibility and a procurement area, I think, is impossible.

If I were in his position, I would certainly want to have it clear. I believe that what we are suggesting here and what you have just suggested would clarify it. That would be a big help.

The other point is that we would hate to see all the wheels stopped until you could get this report from OFPP. But we certainly would support the idea of limiting it to policy consistent with existing law.

Mr. BROOKS. And with concurrence of the Director.

Mr. STAATS. Yes. Right.

Mr. BROOKS. Then you have that input.

Mr. STAATS. Right.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

On that last subject, I want to indicate to the subcommittee and also to Mr. Staats that I tend to agree with the statement that you have just made. I would not want to lose all of the directive authority,



but I think that, if it is harnessed in the manner which has been suggested so that you have the concurrence of the Director of OMB, I think that is a good solution to the problem. I certainly would agree with what you have said in that connection.

I am concerned, as I indicated in my opening statement, about the loss of the directive authority. I certainly would not want to have that completely washed out. So, I think that that is a good way to solve the problem. I think it is a constructive way. I think perhaps we have been deficient in not having that type of arrangement as far as the Office is concerned.

I also want to indicate that, in general, I think I would agree with the statement that you have made. As a former member of the Procurement Commission, I think that what you have said has been pretty much on target with what the Commission recommended and what was intended as far as this Office was concerned.

I also think it is important to underscore that what we have here is a legislative oversight situation brought on by, in a sense, a sunset provision which many people in the Congress are now talking about. This is a good illustration of what can be done and why it is important to have this type of review.

I think that what we are seeing here today is a result of the need for continuing authorization—a review of what has been accomplished as far as this Office is concerned and a reevaluation of where we are and where we are going to go as far as this Office is concerned.

I think that that is a reason for me to ask this question so that we put it in proper perspective. What is your understanding, as a former member of the Commission and also as the Comptroller General and one who has followed the work of this Office, and what is your opinion as to what the overall mission of the Office is or should be?

Mr. STAATS. I believe that the overall role and responsibility of the Office should be to provide a point of leadership in the executive branch and of policy formulation within existing law in an effort to try to get greater consistency and commonality in the policies, procedures, forms, and reduction of paperwork—all the things that go along with the procurement process.

I think furthermore, it should take the leadership in formulating executive branch decisions on proposed legislation in the procurement field. There has been an absence of a place in the executive branch that could look at procurement as a whole.

We have tended to have two different statutory bases for procurement. One is the Administrative Services Property Act of 1949, and the other is the Armed Services Procurement Act—with amendments to both of those statutes. What we need is at least an understanding of, if there are to be differences, why those differences exist; otherwise, they should be the same.

That seems to me—

Mr. HORTON. If I may interrupt your testimony. That was a very important consideration, as I recall, as far as the Procurement Commission was concerned. That matter of reconciling those statutes, as far as I know, has not been accomplished to this day. Is that correct?

Mr. STAATS. I agree with you; we in the Commission felt that that should be one of the major objectives. We also recognize that you had a lot of history to overcome here. There have been strongly held views as to where the jurisdiction should rest within the Congress itself.

But that does not excuse the executive branch from not taking the initiatives and making the effort to try to come forward with the common statute.

In many ways, this is probably the number one priority from the legislative program standpoint.

Mr. HORTON. The reason I asked that question—and I think it is important to put it in proper perspective—relates to the opinion of the Attorney General.

Mr. Chairman, I would like to ask unanimous consent that we put in the record at this point the opinion of the Attorney General with respect to the matter that was referred to earlier by Mr. Staats in connection with the actions of the Administrator.

Mr. STAATS. I would support that because it bears directly on the question the chairman raised with respect to the policy.

Mr. BROOKS. Without objection, it will be inserted in the record.  
[The material follows:]

THE WHITE HOUSE,  
Washington, D.C., March 19, 1979.

HON. JACK BROOKS,  
Chairman, Committee on Government Operations,  
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your committee has expressed interest in the question whether the Department of Labor or the Office of Federal Procurement Policy has ultimate statutory authority to determine questions of coverage under the Davis-Bacon Act, the Walsh-Healey Act, the Service Contract Act and related statutes and orders. As you know, last October we requested the Attorney General's legal opinion on this issue.

On March 9 the Attorney General concluded that the authority in question resides with the Department of Labor. Enclosed is a copy of the Attorney General's opinion.

As you may know, OFPP and Labor have been working jointly to address issues related to administration of these laws. The goal is to insure that their administration does not fuel inflation. This cooperative process is in no way affected by the Attorney General's opinion.

If I can provide further information on this matter, please call me.

Sincerely,

ROBERT J. LIPSHUTZ,  
Counsel to the President.

OFFICE OF THE ATTORNEY GENERAL,  
Washington, D.C., March 9, 1979.

THE PRESIDENT,  
The White House.

DEAR MR. PRESIDENT: I have the honor to comply with your request of October 30, 1978 for my opinion on the following question:

Does the Office of Federal Procurement Policy have the final statutory authority within the Executive Branch on the question of whether the Service Contract Act, the Walsh-Healey Act, or the Davis-Bacon Act where relevant, apply to particular classes of Federal contracts? For example, would the Secretary of Defense in the procurement of engine overhaul contracts be required to follow the direction of the Administrator of Federal Procurement Policy that such contracts be awarded pursuant to the Walsh-Healey Act notwithstanding the interpretation of the Secretary of Labor that such contracts are subject to the Service Contract Act?

I have concluded that the powers of the Administrator of OFPP were not intended by Congress to extend to the construction of the substantive provisions, including questions of coverage, of the three statutes to which you refer.<sup>1</sup>

<sup>1</sup> My opinion was not requested on the underlying question whether the Walsh-Healey or Service Contract Act applies to the engine overhaul contracts, and this opinion accordingly expresses no view of that issue.



Your request has arisen from a conflict between the Department of Labor and the Department of the Air Force, regarding the proper interpretation of the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*, and the Service Contract Act, 41 U.S.C. § 351 *et seq.* The underlying facts I understand to be as follows. The Air Force uses private contractors to overhaul and rebuild used jet engines. Either the Walsh-Healey Act or the Service Contract Act governs the terms of these contracts relating to the compensation of the contractors' employees. Both statutes would require the contract to stipulate a minimum wage level. However, the Service Contract Act would require the contractor to pay substantially higher wages and would correspondingly increase the cost of the contracts to the Government.<sup>2</sup>

The Air Force has contended that the engine overhaul contracts are subject to the Walsh-Healey Act. The Secretary of Labor has interpreted the two statutes and concluded that the wages of certain employees on the contracts are to be set under the Service Contract Act. The Comptroller General<sup>3</sup> and one district court<sup>4</sup> have held that the Secretary's interpretation binds the Air Force. If the Office of Federal Procurement Policy (hereafter "OFPP") has authority to do so, it intends to supersede the ruling of the Secretary of Labor by issuing an authoritative interpretation of the Walsh-Healey and Service Contract Acts that will determine which one governs wages under the engine overhaul contracts. The Department of Labor contends that OFPP lacks this authority.

As a preliminary matter, it is necessary to discuss the role of the Department of Labor in the implementation of the Davis-Bacon Act,<sup>5</sup> Walsh-Healey Act,<sup>6</sup> and Service Contract Act<sup>7</sup> (hereafter the "contract labor standards statutes"). Enacted between 1931 and 1965, these statutes differ in details of coverage,<sup>8</sup> administration, and remedy, but their purpose and basic mechanism is the same. Each was enacted against the background of the Comptroller General's consistent rule that an executive agency may not, without statutory authority, require a minimum level of wages under a contract when a qualified contractor is willing to lower the cost to the government by paying his employees less.<sup>9</sup>

Each serves the related goals of maintaining wages at a given level and preventing the competitive aspects of government procurement from depressing them. As stated in the legislative history of the Walsh-Healey Act, the statutes "end the present paradoxical and unfair situation in which the Government, on the one hand, urges employers to maintain and uphold fair wage standards and, on the other, gives vast orders for supply and construction to the lowest bidder."<sup>10</sup> They tend to remove the element of labor costs from the competition to be low bidder on a government contract.

With differences of detail, each statute uses the same mechanism.<sup>11</sup> The Secretary of Labor determines the "prevailing rate" of wages in the "locality" for

<sup>2</sup> Briefly, the Walsh-Healey Act requires the contract to stipulate for payment of the "prevailing minimum wage" of the industry concerned at the place where the goods covered by the contract are to be manufactured or furnished. 41 U.S.C. § 35(b). The Service Contract Act requires a contract provision specifying minimum wages in accord with "prevailing rates in the locality" and fringe benefits "prevailing . . . in the locality." 41 U.S.C. § 351(a)(1)-(2). Prevailing wages are determined by the Secretary of Labor under both statutes. Except for the bituminous coal industry, however, the Labor Department has not made a minimum wage determination under the Walsh-Healey Act since the decision in *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1964), held that it would have to disclose the raw statistical data on which it relied. See also 41 U.S.C. § 43a. At present, the Walsh-Healey minimum wage is \$2.30 per hour, the statutory minimum. 41 CFR § 50-202.2. In contrast, wages and fringe benefits under the Service Contract Act are determined for different classes of employees in the light of actual practice, including collective bargaining agreements. See 29 CFR § 4.164. Successor service contractors are bound by the minimum wages and benefits in collective bargaining agreements of their predecessors. 29 CFR § 4.1c.

<sup>3</sup> See 53 Comp. Gen. 412 (1973); B. B. Saxon Co., Inc., No. B-190505 (June 1, 1978) (unpublished decision).  
<sup>4</sup> *Curtiss-Wright Corp. v. McLucas*, 381 F. Supp. 657, 662-66 (D. N.J. 1974); *Curtiss-Wright Corp. v. McLucas*, 364 F. Supp. 750, 760-72 (D. N.J. 1974).

<sup>5</sup> 46 Stat. 1494, as amended, 40 U.S.C. § 276 *et seq.*

<sup>6</sup> 49 Stat. 2036, as amended, 41 U.S.C. § 35 *et seq.*

<sup>7</sup> 79 Stat. 1034, 41 U.S.C. § 351 *et seq.*

<sup>8</sup> The Davis-Bacon Act applies to "laborers and mechanics" employed on the construction, alteration, or repair of public buildings or works of the United States or District of Columbia. 40 U.S.C. § 276a. The Walsh-Healey Act applies to "persons employed by the contractor" in manufacturing or furnishing the "materials, supplies, or equipment" to be provided under a contract with the United States or the District of Columbia. 41 U.S.C. § 35(a)-(b). The Service Contract Act applies to "service employees" under any contract "the principal purpose of which is to furnish services" to the United States or District of Columbia, 41 U.S.C. § 351(a), but excludes work regulated by the Davis-Bacon or Walsh-Healey Acts. 41 U.S.C. § 356(1)-(2).  
<sup>9</sup> See generally 10 Comp. Gen. 294, 300-01 (1931); 15 Comp. Gen. 2, 4 (1935); 18 Comp. Gen. 285, 195 (1938); 42 Comp. Gen. 1, 2-5 (1962); 50 Comp. Gen. 592, 598-90 (1971).

<sup>10</sup> S. Rept. 1157, 74th Cong., 1st Sess., at 2. Similar explanations appear in H. Rept. 1162, 71st Cong., 2nd Sess., at 2 (Davis-Bacon Act) and H. Rept. 948, 89th Cong., 1st Sess., at 2-3 (Service Contract Act).

<sup>11</sup> The differences between the Walsh-Healey and Service Contract Act, as they affect the dispute underlying this opinion, are discussed at note 2, *supra*.



employees covered by the statute, and the contract must contain a provision requiring that those employees will be paid at least that rate.<sup>12</sup> All of the contract labor standards statutes give the Secretary power to interpret them through regulations.<sup>13</sup> Before the enactment of Pub. L. 93-400, it was well settled that the Secretary had authority under the contract labor standards statutes to interpret their substantive provisions, including those dealing with coverage, and the courts and Comptroller General deferred to any interpretation not clearly contrary to law.<sup>14</sup>

Once the Secretary of Labor has made a wage determination, the contracting agency is responsible for notifying bidders of the wages that must be paid and for incorporating the wage determination into the contract.<sup>15</sup> In addition, the contracting agencies are given the power to enforce the statutes both by withholding payments from contractors equivalent to underpayment of wages<sup>16</sup> and by terminating the contract in the case of a violation.<sup>17</sup> Reorganization Plan No. 14 of 1950 gave the Secretary the power to coordinate the administration of the contract labor standards statutes by the contracting agencies and to prescribe "appropriate standards, regulations, and procedures" for their enforcement.<sup>18</sup> Under this authority, the Secretary has promulgated regulations governing the form of contract stipulations required by the contract labor standards statutes;<sup>19</sup> detailing the reporting and auditing requirements of the contracting agencies,<sup>20</sup> and allocating the handling of complaints between the Labor Department and the contracting agency.<sup>21</sup>

The regulations of the procurement agencies themselves govern the withholding of payments and the termination of contracts.<sup>22</sup>

In 1974 Pub. L. 93-400 established OFPP "to provide overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws."<sup>23</sup> To achieve this purpose, 41 U.S.C. § 405(a) authorizes the Administrator of OFPP to:

... provide overall direction of procurement policy. To the extent he considers appropriate, and with due regard to the program activities of the executive agencies, he shall prescribe policies, regulations, procedures, and forms, which shall be in accordance with applicable laws and shall be followed by executive agencies (1) in the procurement of—(A) property other than real property in being; (B) services, including research and development; and (C) construction, alteration, repair, or maintenance of real property; . . .

The authority of an executive agency under any other law to prescribe "policies, regulations, procedures, and forms of procurement" is expressly made subordinate OFPP's authority under this section by 41 U.S.C. § 408. As a general matter, it was the intent of Congress to confer upon OFPP the central responsibility for procurement policy and for developing regulations within the Executive branch, able to act with the force of law, but subject to existing statutory procurement policies.<sup>24</sup>

<sup>12</sup> 40 U.S.C. § 276a; 41 U.S.C. § 35(b); 41 U.S.C. § 351(a).

<sup>13</sup> 40 U.S.C. § 276c; 41 U.S.C. § 38; 41 U.S.C. § 353(a).

<sup>14</sup> See *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-09 (1943); *Nello L. Teer Co. v. United States*, 348 F.2d 533, 539-40 (Ct. Cl. 1965); *Curtiss-Wright Corp. v. McCluskey*, 364 F. Supp. 750, 762 (D.N.J. 1973). 53 Comp. Gen. 647, 649-51 (1974); 53 Comp. Gen. 370, 376 (1973).

<sup>15</sup> 40 U.S.C. § 276a; 41 U.S.C. § 35; 41 U.S.C. § 351(a).

<sup>16</sup> 40 U.S.C. § 276a; 41 U.S.C. § 36; 41 U.S.C. § 352(a). Withheld sums are deposited in a special account and paid to employees on order of the Secretary of Labor.

<sup>17</sup> 40 U.S.C. § 276a-1; 41 U.S.C. § 36; 41 U.S.C. § 352(c).

<sup>18</sup> 15 F.R. 3176, 64 Stat. 1267.

<sup>19</sup> 29 CFR §§ 4.6-7; 29 CFR § 5.5; 41 CFR § 50.201.1.

<sup>20</sup> 29 CFR §§ 3.3-4; 29 CFR § 5.6.

<sup>21</sup> 29 CFR § 4.187; 29 CFR §§ 5.6-5.7; 41 CFR § 50-201.1201.

<sup>22</sup> See Armed Services Procurement Regulations (ASPR) ¶¶ 12-1005.9, 18-704.13; 41 CFR §§ 1-12.907. I would note that these regulations are by no means uniform. For example, the ASPRs for the Service Contract Act authorize withholding only when requested by the Labor Department, while the Federal Procurement Regulations (FPRs) for the Service Contract Act and both sets for the Davis-Bacon Act permit withholding on the agency's initiative. Compare ASPR ¶ 12-1005.9(a) with ASPR ¶ 18-704.13(a); 41 CFR §§ 1-12.907(a); 1-18.705-9. The ASPRs also prescribe audit procedure under the Davis-Bacon Act in great detail which has no counterpart in the FPRs. ASPR ¶ 18-704.8-704.12. Finally, the ASPRs and FPRs apply the disputes clause of the contract to Davis-Bacon Act disagreements with the contract in different ways. Compare ASPR ¶ 18-706 with 41 CFR § 1-18.706. Neither uses it where the Service Contract Act is involved.

<sup>23</sup> The Administrator may only make general determinations and cannot decide "specific actions in the award or administration of procurement contracts." 41 U.S.C. § 405(f)(2). In addition, the procurement policies and regulations of the other executive agencies remain in force until he has acted. 41 U.S.C. § 409. Thus, the Administrator's role is prospective; he cannot act as an administrative court of appeal from procurement actions already taken. See generally H.R. Rept. 93-1176, 93rd Cong., 2nd Sess., at 10-11.

<sup>24</sup> See generally S. Rept. 93-692, 93rd Cong., 2nd Sess., at 17, 18; H.R. Rept. 93-1176, 93rd Cong., 2nd Sess., at 14.

Thus far the Department of Labor and OFPP agree. They dispute whether the interpretation of the contract labor standards statutes to determine which, if any, applies to a particular class of contracts, is a matter of procurement policy within the meaning of 41 U.S.C. §§ 405(a), 408. The Department of Labor argues that the purpose of the contract labor standards statutes is to use the procurement process in furtherance of the socio-economic goal of supporting adequate wages, hours, and working conditions, that the interpretation of the statutes in pursuit of that goal is not a procurement matter, and that OFPP's authority over the labor standards statutes is therefore limited to regulating the mechanism by which the Department's socio-economic decisions are implemented through the procurement process. OFPP contends, on the other hand, that the contract labor standards laws are implemented only through the procurement process, that their substantive provisions are congressional declarations of procurement policy, that interpreting these provisions significantly affects the procurement process, and that OFPP therefore has authority to make binding interpretations of the coverage of the statutes.

Pub. L. 93-400 does not define "procurement" or "procurement policy." Its legislative history makes only one explicit reference to the contract labor standards laws. In discussing OFPP's authority under 41 U.S.C. § 405(a), the Senate committee report states that its "cognizance of procurement policy would extend to the *procurement aspects* of regulations issued by the social and economic agencies such as the Small Business Administration, the Environmental Protection Agency, and the Department of Labor ('Davis-Bacon, Walsh-Healey, contract safety standards, equal employment opportunity') . . ." <sup>25</sup> Plainly OFPP was intended to have authority over some, but not all, aspects of the contract labor standards statutes. However, neither the Senate nor the House reports delineate the "procurement aspects" of these statutes. Instead, Congress' understanding of the subject is to be found in the background information that led to the passage of Pub. L. 93-400.

In 1969, the Commission on Government Procurement was established by statute to examine the entire federal procurement system and recommend measures that would increase its economy and efficiency. <sup>26</sup> The Commission's activities were to be focused on three areas: existing statutes, executive procedures, and procurement organization. <sup>27</sup> Both houses of Congress took the view that the principal procurement statutes were the Armed Services Procurement Act <sup>28</sup> and the Federal Procurement Act, <sup>29</sup> which govern authority to procure property and services and the methods used in entering and administering procurement contracts. <sup>30</sup> They considered that one of the Commission's principal tasks would be to consider the possibility of attaining uniformity in the Executive branch regulations and procedures implementing these two statutes. <sup>31</sup> In contrast, Congress considered the contract labor standards statutes to be among the "ancillary" statutes which affect procurement. <sup>32</sup> The Commission was expected to study legislative changes in the contract labor standards statutes "in the interest of minimizing differences of interpretation and of striking a proper balance among the statutory objectives, which seek to protect workers on the one hand, and to achieve efficient and economical procurement on the other." <sup>33</sup>

The Commission on Government Procurement submitted its final report to Congress in 1972. <sup>34</sup> Its first and principal recommendation was the establishment of an OFPP with authority to direct procurement policy throughout the Executive branch. <sup>35</sup> The Commission regarded OFPP as the device through which many, though not all, of its 149 recommendations would be implemented. <sup>36</sup> Both the House and Senate legislative histories state unequivocally that the purpose of Pub. L. 93-400 was, with exceptions not relevant here, to create an OFPP

<sup>25</sup> S. Rept. 93-692, 93rd Cong., 2nd Sess., at 18. (Emphasis added.)

<sup>26</sup> See Pub. L. 91-129, §§ 1, 5(a), 83 Stat. 269.

<sup>27</sup> See S. Rept. 91-427, 91st Cong., 2nd Sess., at 2.

<sup>28</sup> 10 U.S.C. § 2301, *et seq.*

<sup>29</sup> 41 U.S.C. § 251, *et seq.*

<sup>30</sup> S. Rept. 91-427, 91st Cong., 1st Sess., at 4; H.R. Rept. 91-468, 91st Cong., 1st Sess., at 15.

<sup>31</sup> S. Rept. 91-427, 91st Cong., 1st Sess., at 4-5; H.R. Rept. 91-468, 91st Cong., 1st Sess., at 16.

<sup>32</sup> S. Rept. 91-427, 91st Cong., 1st Sess., at 6, 12-14; H.R. Rept. 91-468, 91st Cong., 1st Sess., at 15.

<sup>33</sup> H.R. Rept. 91-468, 91st Cong., 1st Sess., at 15, 28.

<sup>34</sup> Report of The Commission on Government Procurement (1972) (hereafter "CGP Report").

<sup>35</sup> CGP Report, vol. 1, at 9; see H.R. Rept. 93-1176, 93rd Cong., 2nd Sess., at 4; S. Rept. 93-692, 93rd Cong., 2nd Sess., at 15; "Office of Federal Procurement Policy," Hearings Before a Subcommittee of the House Committee on Government Operations, 93rd Cong., 1st Sess. (hereafter "House Hearings"), at 318.

<sup>36</sup> CGP Report, vol. 1 at 12-14; H.R. Rept. 93-1176, 93rd Cong., 2nd Sess., at 26-28; S. Rept. 93-692, 93rd Cong., 2nd Sess., at 15.



with the powers and functions recommended by the Commission.<sup>37</sup> The Commission's views on the relation between OFPP and the contract labor standards statutes are therefore the principal indication of Congressional intent on the subject.<sup>38</sup>

The Commission was aware that numerous social and economic programs were implemented through the procurement process, including the contract labor standards statutes.<sup>39</sup>

It took the view that these programs were contrary to the general procurement policy of buying from the lowest responsible bidder, imposed substantial cost and administrative burdens on the government, and imposed serious burdens on contractors.<sup>40</sup> The Commission believed that the lack of a single administrative authority above the program and procuring agencies<sup>41</sup> was in part the cause of these problems. It considered the interpretation of the contract wage-hour statutes, particularly the Davis-Bacon and Service Contract Acts, as one of the major socio-economic burdens on the procurement process.<sup>42</sup>

However, the Commission did not recommend that OFPP be given power to interpret the statutes governing socio-economic programs. It recommended instead that the Congress and the Executive branch reexamine the socio-economic programs applied to the procurement process and their application, that their dollar threshold be raised, and that their cost be made more visible. These recommendations did not name OFPP as the implementing agency, in contrast to several other Commission recommendations.<sup>43</sup> The Commission's comments on the contract labor standards laws are thus consistent with the legislative history of its establishing statute; they point out possible faults in the substantive aspects of these programs but consider them a matter for further Congressional action.

Congressional consideration of the Commission's report supports this view of the Commission's recommendations. I find particularly significant the testimony of Comptroller General Staats, a member of the Commission, who testified in both House and Senate hearings on OFPP's authority over socio-economic programs implemented through procurement. Before the House subcommittee, he stated that he construed the section of the bill which became 41 U.S.C. § 408 not to affect the specific statutory authority of the Department of Labor to make wage determinations under the Davis-Bacon or Service Contract Acts.<sup>44</sup> Congressman Hollifield, Chairman of the subcommittee and Vice-chairman of the Commission, did not disagree.<sup>45</sup> In the Senate hearings, Senator Roth asked the Comptroller General whether OFPP would have authority to determine whether procurement should be used to pursue socio-economic goals. Mr. Staats replied:

These provisions of law today which the Commission described as having social objectives as well as procurement objectives are for the most part—if not exclusively—in the statute. It would require a statutory action to modify them.

The Commission has debated this general subject at great length and, subject to correction from my colleagues or from the Chairman, who was also a member, it was our view, I believe, that the OFPP would not be concerned with these kinds of issues; that these should be matters for the Congress to pass upon in the form of modifications and legislation, rather than wiping the slate clean and delegating that kind of role to OFPP itself.

This gets back, in part, to what we were talking about a few minutes ago. There must be an initiative somewhere in the executive branch in a great

<sup>37</sup> H.R. Rept. 93-1176, 93rd Cong., 2nd Sess., at 3, 4; S. Rept. 93-392, 93rd Cong., 2nd Sess., at 23.

<sup>38</sup> See, e.g., *Doherty v. United States*, 404 U.S. 28, 34-36 (1971) (Douglas H. concurring); *Bindzyck v. Finucane*, 341 U.S. 76, 80-83 (1951). See generally 2A Sutherland, *Statutory Construction* § 48.11, at 212.

<sup>39</sup> See CGP Report, vol. 1, at 11, 33, 114-15. Among the socioeconomic goals, the Commission listed preferences for domestic contractors, abatement of pollution, prohibiting racial discrimination by contractors, favoring small business, maintenance of labor standards, and prevention of corruption. *Id.* at 114-15.

<sup>40</sup> *Id.* at 111-12, 121-22.

<sup>41</sup> *Id.* at 11, 119.

<sup>42</sup> *Id.* at 33, 116-17, 120.

<sup>43</sup> *Id.* at 118-22 (Recommendations 42-45). The Commission's Recommendation 10 was that OFPP develop, as far as feasible, a uniform system of procurement regulations. The discussion of that recommendation, however, considers regulations implementing the contract labor standards law to be "collateral" rather than "procurement" regulations. *Id.* at 31-33. Procurement regulations are limited, in the Commission's view, to the Armed Forces Procurement Regulations, the Federal Procurement Regulations, and their equivalents in several semi-autonomous procuring agencies.

<sup>44</sup> House Hearings, *supra*, n. 35, at 366.

<sup>45</sup> House Hearings, *supra*, n. 35, at 355. In subsequent written questions, the subcommittee suggested that additional language "may be necessary" to clearly incorporate the Comptroller General's construction and asked him to submit a proposed modification. Although the Comptroller General did so, the subcommittee took no further action. *Id.* at 364.



many of these cases before Congress itself can act objectively. The social objectives are written through a great many statutes. The list is very long. But the initiative could come from a central point, and a coordinated executive branch position could be developed as a way of raising the question in the Congress on both existing procurement legislation and new procurement legislation.<sup>46</sup>

Senator Chiles, Chairman of the subcommittee, former member of the Commission, and Senate sponsor of the OFPP legislation, ended the discussion by saying that the bill would give OFPP authority to insure that the procurement agencies pursued statutory socio-economic goals in a uniform manner but would not give it "any authority by rule or regulation-making powers to go forward on their own on social objectives."<sup>47</sup> Both he and Senator Roth concurred with the Comptroller General's view that OFPP's only substantive role in this area was to make recommendations to Congress.<sup>48</sup> This is the whole of congressional consideration of the problem.

These materials lead me to the conclusion that neither the Commission nor Congress intended to give OFPP authority to overrule the program agencies in their interpretation of the substantive aspects of statutory socio-economic programs implemented through the procurement process. In creating the Commission, Congress intended it to recommend changes in "ancillary" statutes affecting procurement, including the contract labor standards statutes.

The Commission, however, did not consider these programs as "procurement"; instead it viewed them as extraneous burdens on the procurement system.<sup>49</sup> While the tone of the Commission's report is unsympathetic to this use of procurement, it does not recommend that OFPP be empowered to lessen the burden by modifying the substance of the programs. Instead, it recommends further study of the socio-economic programs and a more realistic assessment of their cost to the government.<sup>50</sup> The Commission also recommended that legislation to consolidate and clarify the contract wage-hour statutes be studied.<sup>51</sup> To the extent that Congress considered the matter, the sponsors of Pub. L. 93-400, who had been members of the Commission, appear from the legislative history to have accepted the view that OFPP could not alter the substantive aspects of statutory socio-economic programs. One important substantive aspect of those programs was the Secretary of Labor's statutory power to make the substantive determination as to which statute applied to a particular contract.

In addition, the lack of Congressional attention to OFPP power over the substance of these programs is strong evidence that Congress did not intend to give it that power. As the Commission report points out, these programs serve a broad variety of interests: labor, environment, small business, anti-discrimination, protection of domestic industry, and others. These interests have been represented by active and zealous partisans who have received the considered attention of Congress.

The contract wage-hour statutes in particular are the result of a strong legislative concern that the government's general interest in efficient, economical procurement will not be satisfied at the expense of contractors' employees.<sup>52</sup> While the Commission recommended that the substantive socioeconomic statutes be reviewed and modified, it concluded that task should be left for another day. Public Law 93-400 was not intended itself to modify these statutes, and did not have that effect. In the light of the legislative history of the statute establishing the Commission on Government Procurement, the conspicuous absence of Commission or Congressional comment on OFPP's effect on the substantive aspects of these programs is persuasive evidence that Congress did not intend to interfere with existing agency power to make policy in these areas that would affect procurement. See generally *NLRB v. Robbins Tire & Rubber Co.*, — U.S. —, 98 S. Ct. 2311, 2324-25 (1978).

<sup>46</sup> "Establishing Office of Federal Procurement Policy," Hearings Before an Ad Hoc Subcommittee of the Senate Government Operations Committee on S. 2198 and S. 2510, 93rd Cong., 1st Sess. (hereafter "Senate Hearings") at 223. Senator Chiles, Chairman of the Senate subcommittee, had been a member of the Commission.

<sup>47</sup> Senate Hearings, *supra*, n. 46, at 224.

<sup>48</sup> Senate Hearings, *supra*, n. 46, at 224-25.

<sup>49</sup> See CGP Report, vol. 1, at 111-18. The report refers to the Labor Department's wage-hour regulations as "collateral" ones that "affect" procurement. *Id.* at 33.

<sup>50</sup> CGP Report, Vol. 1, at 189 (Recommendations 43-45).

<sup>51</sup> CGP Report, vol. 4, at 169, 179-84.

<sup>52</sup> See H. R. Rept. 1162, 74th Cong., 2d Sess., at 2 (Davis-Bacon Act); S. Rept. 1157, 74th Cong., 1st Sess., at 4 (Walsh-Healey Act); H. R. Rept. 948, 80th Cong., 1st Sess., at 3 (Service Contracting Act).

Thus, the legislative history of Public Law 93-400 recognizes a distinction between the "procurement aspects" of the contract labor standards statutes and the substantive enforcement of those statutes. OFPP was given authority to set policy over the procurement aspects in the interest of uniformity but it was not given substantive authority over the achievement of socio-economic objectives.

This division of responsibility corresponds with that originally recognized under the contract labor standards statutes—the Department of Labor sets the basic interpretation of the Acts and establishes the wage rates, and the individual contracting agencies implement the Acts through the exercise of their procurement functions. This division of responsibility was altered somewhat by Reorganization Plan No. 14 of 1950 which empowered the Secretary of Labor to prescribe uniform implementing regulations binding on the procurement agencies. This latter function of the Secretary corresponds with the authority now conferred on OFPP in the interest of achieving uniformity in the implementation of the "procurement aspects" of the contract labor standards statutes. The quite separate responsibility of interpreting and enforcing the socio-economic purposes of the contract labor standards statutes was not conferred on OFPP.

In conclusion, the question whether a particular class of contracts is covered by the Walsh-Healey or Service Contract Acts is one for the decision of the Secretary of Labor, notwithstanding Pub. L. 93-400. In making that decision, the Secretary must exercise discretion within the broad limits of the language of the two statutes. The exercise of this power by the Secretary is subject, of course, to your supervision and direction as Chief Executive.

I have the honor to be  
Respectfully,

GRIFFIN B. BELL,  
*Attorney General.*

Mr. HORTON. I think, in connection with the understanding of what the mission is, it is necessary to understand that this Office was not set up as a major watchdog office. It is not in the context of an inspector general or a General Accounting Office. Perhaps you might comment on that.

Mr. STAATS. I agree with that.

You will recall also, there was another admonition that the OFPP should not get itself involved in individual procurement decisions properly within the province of an agency under authorizations that agency has from Congress.

It should not become, you might say, a way that pressure should be brought upon the Congress or upon executive branch agencies.

I think another way to express what we were looking for was a highly professional group of people who could take leadership in obtaining greater commonality, consistency, and in terms of resolution of differences that exist among the executive branch agencies and to advise the President on legislative program matters.

Mr. HORTON. With regard to your testimony on the constructive aspects of this particular bill that we are considering, I want to indicate that I tend to agree with what you said. I think that the points you made in that connection are well taken.

Overall, I assume that you consider this bill that we are considering now a step forward and, with the improvements that you have suggested, it would be a bill that would tend to establish the OFPP on a more constructive basis and would permit the agency to carry out the intentions of the Procurement Commission in a better fashion than has been done in the past? That is without any criticism of those who have operated the office in that context.

Mr. STAATS. We have made several suggestions here in our statement. Assuming that those were agreeable, we would support the legislation and would say that it would be an improvement over the present statute.



Mr. HORTON. I have one further question. You did raise a question as to the time for the extension. You suggested a 5-year period. Would you comment on why you feel a 5-year versus a 3-year period would be preferable?

Mr. STAATS. The point we make here, in part, is that I think it would be easier to get good people to come in if there is a certainty with respect to a 5-year authorization on the statute.

We think the idea of sunset is good, and we have supported legislation over on the Senate side. But the Senate sunset arrangement contemplates a reassessment of programs on a 10-year cycle. I would not quarrel too much as to whether 5 years or 6 years or 10 years, but it seems to me 3 years is a little short to give an opportunity, particularly now with a new person having to be brought into this. He will have to get his own bearings and decide on his own staffing and all the things that a new administrator has to have. It just seems to me that 3 years is too short.

Mr. HORTON. I thank you very much for your testimony. I think it has been very constructive.

Mr. BROOKS. Mr. Erlenborn?

Mr. ERLBORN. Thank you, Mr. Chairman.

Mr. Staats, let me welcome you to our committee and thank you for your testimony.

Mr. Hall, in answer to a question as to why more was not done or accomplished by OFPP, used one phrase that caught my attention. He said "fear of reprisal."

Mr. Staats, would passage of legislation stripping the OFPP of an important part of the authority that they now exercise possibly prove that there was a real fear of reprisal or at least give that appearance?

Mr. STAATS. I do not know really whether I can answer that question or not. I have some difficulty assessing the extent to which the fear of reprisal has entered into the picture. That could come back to a matter of judgment on the part of individuals involved.

I would support the idea, though, of it continuing to have the responsibility for policy directives consistent with existing law.

Mr. ERLBORN. I am impressed with your recommendation in that regard. I think requiring the Director of OMB to participate and concur in these directives should allay the fears that anyone might have about an abuse of that authority. I would hope that the committee would agree.

Mr. STAATS. It may not be so much a fear of reprisal as to lack of certainty as to where the Office stands. I think the suggestions which we made here would clarify that and make it a much better arrangement.

Mr. HALL. Can I clarify?

Mr. ERLBORN. Yes, please.

Mr. HALL. I believe, in my discussions with OFPP officials, that that was more a state of mind and not a reality. A lack of communication may have contributed to it.

Mr. ERLBORN. The point I would make is, even if it were not a reality at the time, if we now reduce their authority, it would give the appearance that their fear was real. I think it might be wise if we did not do that and maybe give them a little bit more confidence that making tough decisions in an area where you have to step on people's toes is not as hazardous a business as they might have thought



in the first place; and that they do enjoy the backing of Congress in trying to get this job done.

Mr. STAATS. As the chairman indicates, with the OMB Director given more responsibility—and that is what this would amount to—it should help. It would give him more clout and reduce any uncertainties in their minds as to where they stand on a given subject.

Mr. ERLNBORN. I have watched the activities of OFPP and, as a matter of fact, have sought their help in some problems like red meat procurement by the Defense Department. I know how difficult it is to get people to change their old ways. Red meat procurement was the subject of a Defense Department study. The recommendations clearly came out. Years went by before they were implemented. They were only implemented after I went to OFPP and got their help. I know how difficult these things can be.

In retrospect, I think maybe the most important activity of OFPP relative to their current status was the intrusion into the Davis-Bacon area. With your opinion and the Attorney General's opinion, they did not have the authority to do that. I think it is very clear that it was a mistake, but I think it was also a policy mistake. I think it may be the source of some of their current problems.

Davis-Bacon is dear to my heart; that is, the repeal of Davis-Bacon.

Mr. STAATS. I will be glad to send you my testimony presented in the Senate yesterday in favor of repeal.

Mr. ERLNBORN. I look forward to that. I have read your report. I think it is very, very good.

The response that you got to the draft report from the Labor Department, does that give you confidence that we have an impartial Government agency presiding over Davis-Bacon?

Mr. STAATS. We were somewhat disappointed in the response from the Labor Department, which is included in our report, and also the general tenor of the Labor Department's testimony presented yesterday in the Senate as really not being accurate and responsive to the points we made in our report. As so frequently happens, if you don't like the end result, then you criticize the way you did the job; and that is what they were trying to do here.

We filed a complete statement yesterday responding to all the points in the Labor Department's letter. I will be glad to make that available to you, also.

Mr. ERLNBORN. Thank you.

I think maybe the way that the Labor Department responded to you and the history of their enforcement of service contract and Davis-Bacon might have been the reason that OFPP felt that someone ought to step in and give some overall policy direction.

Mr. STAATS. I think it is clearly one that the Congress is going to have to resolve. There are some 77 statutes now which have incorporated Davis-Bacon in one form or another. One of the more recent ones is in revenue sharing, which means that Davis-Bacon has to be observed now by any community that receives revenue sharing money.

Mr. ERLNBORN. The tentacles of Government are long.

Mr. STAATS. It is a difficult political problem; I would certainly share that view of the Labor Department.

This is not the first report GAO has made. This is the ninth report since 1962. In all the reports that we have made, we produced the same result: They have not really measured the prevailing rates in the community in accordance with what the law requires. In half the areas where they have established rates, they have not even made surveys.

That is some indication of the problems that we have found.

Mr. ERLNBORN. Thank you very much.

Mr. BROOKS. Mr. Stangeland?

Mr. STANGELAND. Thank you, Mr. Chairman.

Mr. STAATS, I have just a couple of observations and questions.

The kind of a person who would head up OFPP—in your estimation, would he be a long-time professional Government employee? Or we would be better looking to someone from the private sector in the area of management to come in and head up an office like this?

Mr. STAATS. I would say it would be better for him to have at least considerable amount of Government procurement experience because the procurement system within Government is so greatly different from what it would be in General Motors or A.T. & T. I suppose a combination would be your ideal, if you could get a person who had that kind of experience in the private sector as well as in the Government sector.

The principal thing I would emphasize is you need a person who is a professional and not a person who is there for political reasons. It is not an easy job. It is one of the most complicated jobs that you could possibly imagine.

Mr. STANGELAND. I guess the reason for my question is the question of whether it is 3 years or 5 years. Sometimes I think the longer the period of time, the longer it takes to get the job done. If you give him 7 years, it will take up to 7 years.

I am wondering if the Federal Government can benefit from the approach to procurement that maybe a General Motors or an A.T. & T. or whatever would bring to Government procurement?

Mr. STAATS. I guess I just have to repeat that, if you could get a good combination of private and public experience, that would be fine. But this brings up a point that I would like to emphasize with respect to the Federal Acquisition Institute training program. There is a lot that can be learned from the private sector. Part of the training program should be to bring in people from the private sector for lectures and as resource people. We can get case studies of how it is done outside the Government.

I think one of the things we have tried to do in GAO at all times is, when we get into one of these problems, we try to go out and find out if we can learn anything from the private sector.

Mr. STANGELAND. I have one other question for my information because this is new to me.

Was the Procurement Commission a multifaceted, private enterprise Government commission?

Mr. STAATS. It was a Hoover-type commission. It had two from the House, two from the Senate, myself as a statutory member. The Chairman was from the private sector, who had been a former Assistant Secretary of Defense. We had people from industry on that.

Mr. STANGELAND. I think Mr. Erlenborn makes the point that change in attitudes is very difficult to come about within Government.



I think maybe the private sector influence could affect some of that change.

Mr. STAATS. I think one of the very useful things that the Commission did was to set up a whole series of task groups made up of people from the private sector and the public procurement sector.

Mr. STANGELAND. Does GAO look at procurement policy and make any recommendations of its own? I understand you were on the Commission. So, I expect that you certainly had input there.

Mr. STAATS. Yes; we do.

Mr. STANGELAND. But, as an organization, you do make recommendations on procurement policy?

Mr. STAATS. Yes. Our recommendations, of course, are made to the Congress. We do not have any authority to direct anybody to do anything. If they spend money illegally, then we can take exception to the payment. But, beyond that, we are advisory to the Congress and, to some degree, to the executive branch.

Mr. STANGELAND. Could you be and did you offer advisory suggestions to OFPP?

Mr. STAATS. Pardon?

Mr. STANGELAND. Could you, or did you, or have you offered suggestions to OFPP? You offer your advice or suggestions to Congress, but can you—

Mr. STAATS. Of course, in any matter where OFPP is involved, we would consult with them, just like we would consult with any agency before we made our recommendations. We would want the input into it. But we would not be guided by what they recommended necessarily.

Mr. STANGELAND. Thank you, Mr. Staats.

I have no more questions, Mr. Chairman.

Mr. BROOKS. Thank you, Mr. Stangeland.

I would ask unanimous consent to insert in the record at this point a statement submitted by the Computer and Business Equipment Manufacturers Association. The statement is signed by Vico Henriques president of the association, in support of the legislation. He is an old friend and is here today. He is as dedicated as ever.

[The material follows:]

COMPUTER AND BUSINESS EQUIPMENT  
MANUFACTURERS ASSOCIATION,  
Washington, D.C., May 2, 1979.

Hon. JACK BROOKS,  
Chairman, Committee on Government Operations, U.S. House of Representatives,  
Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to provide you with my views on H.R. 3763. As you know, we testified earlier on a similar proposal in the Senate concerning the extension of OFPP's life and functions. The views which are incorporated in this letter focus primarily on the differences between your bill and that which was proposed in the other Chamber.

In your cover letter you commented that "OFPP has spread itself too thin." We agree with this conclusion and offered these comments:

"The size of the Agency appears to be generally acceptable. Its current staffing level forces a discipline on the Agency which is important in issue selection so that the main stream of activities are channeled into those things which are of the greatest importance on a Government-wide basis in policy areas. There may be from time-to-time, temporary resource supplements for large projects, such as the Federal Acquisition Regulations. These should be sought and supplied by the Congress on the year-to-year appropriations. We do, however, have a concern that Congress may mandate responsibilities for issues without concomitant resources and we encourage your Committee, to be sensitive to the potential overload which could be created for OFPP, which could strain their resources and force



a dilution in their activity level, such that it would become a bureaucratic farce."

Thus, the amendments you propose have anticipated our concerns and appear to solve the problem.

I would like, now, to focus on specific provisions in your bill about which we have positions. To begin with specific provisions of your amendments, Paragraph 6(d)(1) of the Act concerns recommendations of the Commission on Government Procurement, we have stated:

CBEMA spoke to the subject covered by Section 6(d)(1) of the Act as amended as follows:

"OFPP has been charged with the implementation and fostering of the recommendations of the Commission on Government Procurement. There remain, unfinished, a number of recommendations which need attention. We suggest these recommendations be re-examined, to determine whether they should be completed; whether they should be updated and then completed; or whether time has passed by the need for the recommendation, and the recommendations simply should be cleared from the board. In this area, OFPP should address the problem and deal with each of the recommendations so as to complete any required action on the products of the Commission on Government Procurement."

Regarding Section 6(d)(2) of the Act, as amended, we have noted that there is a need for a thorough review and revision of the policy which is the underpinning for a uniform set of Federal Acquisition Regulations. We are supportive of this amendment requiring a system, rather than a consolidation of current practices.

On the subject of public participation, called for in Section 6(d)(3), we stated: "A key strength of OFPP, from our perspective, has been the participation allowed and encouraged in the exploration and formulation of public policy. From the point of view of our industry, we are satisfied that the coverage of public participation is sufficient. Self-interest, however enlightened, by itself could be injurious; but OFPP has sought out and received differing points of view on all issues with which we are familiar, and has drawn these together in assessing the final direction for policy regulation. The timing of this participation also seems to be quite acceptable since the interests that have been identified with policy issues are invited into the process early enough to be effective and to encourage thoughtful participation."

And thus, we feel that the amendment accomplishes the objective of adequate public participation.

Regarding Section 6(d)(4), we concur in your objectives, but would like to suggest that specific language may be needed to guide OFPP in the types of research which we feel are currently deficient in their activity. Therefore, I offer the following:

"Comment has been made concerning the lack of research and development on the part of OFPP. We agree that there needs to be, within the current acquisition process, adequate market research about the industries and products with which contracting officers are dealing. We support the recent efforts by OFPP directed toward requiring agencies to do a more effective job of surveying the various products, distribution systems, and other factors of different industries before determining which will be the most cost-effective acquisition technique for the Government on a specific class of items. In future activities, OFPP should be encouraged to increase their effort in market research and to utilize the results of this research in the drafting of policy and regulations, and in the training of contracting officers. We feel that this will help preclude the abuses, or perceived abuses, which have been so widely publicized over the last few months.

"An area which we feel is critical to our industry and to the health of the country is the need for OFPP to recognize in its R&D, in its training efforts, and in its general management functions, the need to create incentives for the inspiration and introduction of innovative new technology into Government. We hope that this will be an initiative which OFPP will undertake and which will separate itself in technique, concern and activity from many of the mature and stable activities and products for which OFPP is responsible. We support the efforts of OFPP to keep Government current and an active partner, through its acquisition activities, in the promotion of American industry."

In reading Section 6(d)(6), we are encouraged by your support of the Federal Acquisition Institute and, as in our comments on research, we feel that specific direction needs to be given concerning the introduction of new technology and products into the Government procurement process. We offer the following thoughts:

"The Federal Acquisition Institute is a much needed organization which will bring to bear the multitude of training activities, facilities and knowledge within

the Federal establishment. We are concerned, however, that the concentration on Federal regulations and policy solely, does not prepare many of the contracting officers to handle procurements for which assignments are made. In short, many of these contracting officers are not trained in the technologies and products which they procure and, therefore, cannot be as effective as they ought to be in assuring that the overall best interests of the Government are being served when they conduct procurements. We hope that, in the future, OFPP can work to alleviate this problem."

Finally, regarding the major change from a directive to a primarily advisory role, we interpret Section 6(h) of the Act to give the authority to OFPP, through the auspices of OMB, to ensure that the current procurement system is consistent with, and in support of, the uniform procurement system to be recommended by OFPP, until such time as the UPS is reviewed, approved, and implemented.

In general, we support H.R. 3763 and offer our cooperation and services to achieve the goals which you have set within these amendments. If we can be of further assistance in providing our views, or in working with you in support of the legislation, please feel free to call upon us.

Very truly yours,

VICO E. HENRIQUES, *President.*

Mr. BROOKS. I would like to thank the Comptroller General, Mr. Sheley, and Mr. Hall for their helpful information brought to us this morning.

We had invited the OMB to testify, but they apparently could not be ready by today.

We are all aware that this legislation is subject to the May 15, reporting deadline of the Congressional Budget Act since it does authorize appropriations for fiscal year 1980. I have always made every effort to meet the requirements of the Budget Act. It was enacted so that Congress would have an orderly timetable in which to consider funding legislation.

It will not work if committees ignore all the deadlines and rely on seeking waivers. If no bill is reported out of the Government Operations Committee by May 15, there may be no choice but to let the Sun set on the OFPP on September 30.

I will have to assess the desirability of seeking a budget waiver before determining whether to proceed with this proposal. If it is decided that we should proceed, I will schedule a later hearing when OMB is ready. We will take our chances. Or we might have an informal discussion with Mr. McIntyre. I have already talked to him about this. He wants to talk with me. I do not think he is set in concrete on it. It may be we can resolve and get his ideas informally and move a little faster. Otherwise, we will just have to take our chances on the Budget Act.

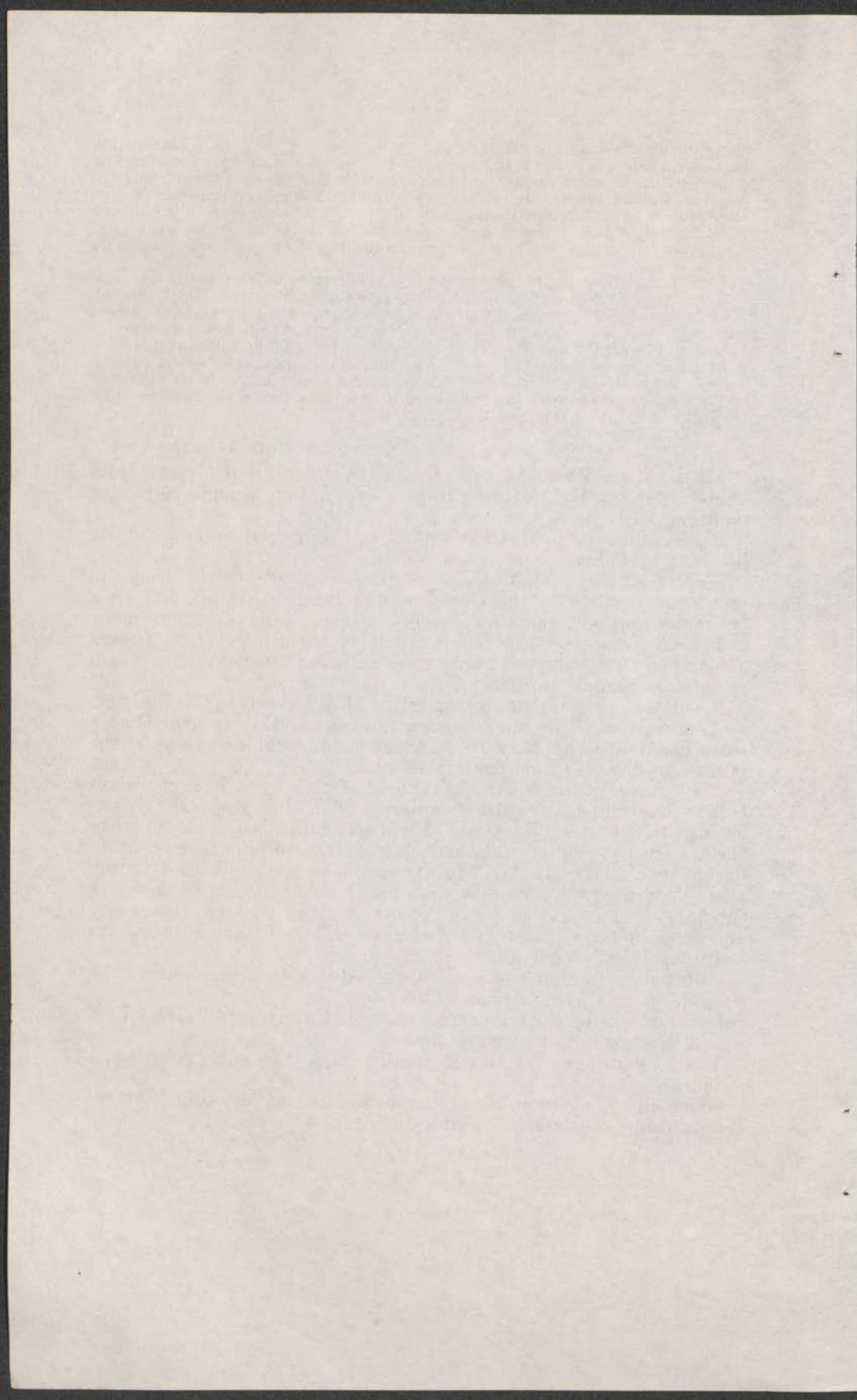
I do point out that there is substantial risk that it might not be possible to get this legislation to the floor.

I would hope that those people who are now involved in the OFPP would take some cognizance of that.

Thank you again. Without further ado, the subcommittee is adjourned.

[Whereupon, at 10:40 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]





## OFFICE OF FEDERAL PROCUREMENT POLICY ACT AMENDMENTS OF 1979

---

MONDAY, MAY 14, 1979

HOUSE OF REPRESENTATIVES,  
LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE  
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:38 a.m., in room 2203, Rayburn House Office Building, Hon. Jack Brooks (chairman of the subcommittee) presiding.

Present: Representatives Jack Brooks, Elliott H. Levitas, Frank Horton, John N. Erlenborn, and Arlan Stangeland.

Also present: Elmer W. Henderson, staff director; William M. Jones, general counsel, full committee; Roland Jones, clerical supervisor; E. Jean Grace, clerk; James Lewin, professional staff member; Robert Brink, professional staff member; John M. Duncan, minority staff director; and James McInerney, minority professional staff, Committee on Government Operations.

Mr. BROOKS. The subcommittee will be in order.

This morning we continue our hearings on H.R. 3763, to modify the authority and to extend the authorization of the Office of Federal Procurement Policy in the OMB. The present authorization was for a period of 5 years and expires on September 30 of this year.

As I pointed out in our earlier hearing, we have had serious questions about the performance of the OFPP and its tendency to exceed the authority granted it by the Congress. Comptroller General Staats also confirmed this tendency. Accordingly, I propose in the bill that the authority to issue regulations which bind the procuring agencies be limited and that the OFPP devote its efforts to developing a uniform procurement system which it will submit to Congress for approval.

Since our hearing, we have had a number of discussions with representatives of the Office of Management and Budget, and we have made some revisions which I believe will be agreeable to all affected parties. These revisions have also been discussed with the GAO, and I understand that the Comptroller General will support the new language.

At this time we will hear from representatives of the OMB. Following their testimony, I hope we can mark up the bill and refer it to the full committee to be considered at a special meeting tomorrow. As you are aware, the Budget Act requires all authorizations for fiscal 1980 to be filed by May 15, and we are making every effort to meet that deadline.



Our first witness is John Patrick White, who was given a recess appointment by the President on November 1, 1978, to serve as Deputy Director of the Office of Management and Budget. He was nominated by the President on January 15, 1979, and the Senate consented to the nomination on April 11, 1979.

From May 1977, Mr. White had been Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics. From 1968 to 1977, Mr. White was with the Rand Corp., Santa Monica, Calif., where he served as senior vice president from 1975 to 1977. From 1964 to 1968, he was on the faculty of LeMoyne College, Syracuse, N.Y. He was on active duty in the Marine Corps from 1959 to 1961.

Mr. White was born in Syracuse, N.Y., on February 27, 1937. He received his undergraduate degree in industrial and labor relations from Cornell University in 1959, his master's degree in economics and public administration from Syracuse University in 1964, and his doctorate in economics from Syracuse in 1969. John White lives in McLean, Va., with his wife, Elizabeth. They have four children.

This is your first visit to the committee. We are pleased to have you, and we look forward to your testimony.

I yield to Mr. Horton to welcome you.

Mr. HORTON. We are very happy to have you with us. We will be glad to have your testimony.

#### **STATEMENT OF JOHN WHITE, DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT**

Mr. WHITE. Thank you, Mr. Chairman.

Director Jim McIntyre asked me to express the views of the Office of Management and Budget regarding the need for legislation to extend the life of the Office of Federal Procurement Policy. We appreciate the opportunity that you have provided us today, Mr. Chairman, to do so.

We also appreciate your action, Mr. Chairman, in introducing legislation to extend the life of OFPP for an additional 3 years and direct the development of a uniform procurement system for the executive branch. We recognize and fully support the desirability of submitting for congressional review a proposed uniform procurement system including standard contract language, clauses, and forms. We also are agreeable to submitting draft legislation to establish a uniform procurement statute and to presenting to the committee a management system for implementing the uniform procurement system. We believe much progress has already been made toward achieving these objectives.

The statutory foundation for OFPP and its directive rather than advisory authority are extremely important, and OFPP has been an essential mechanism for OMB to carry out its responsibilities to the President for improved efficiency and economy in the management of the executive branch. The Director and I have participated directly and personally in all major OFPP programs.

This directive authority is important if our mutually desired goals are to be realized. The goals can be simply stated as: Promulgation of uniform, simple Government-wide regulations providing one face to industry—particularly small and disadvantaged firms; and improving efficiency, effectiveness, economy, and equity in Government contracting.

By directive authority, Mr. Chairman, I do not mean authority to make automatic unilateral decisions, nor can the past decisions of OFPP be so characterized. Directive authority does not mean that serious consideration will not be given to all parties, including executive agencies and the private sector, in the development and coordination of responses to meet established goals. Directive authority—which includes consultation with the agencies involved, solicitation of public comments through Federal Register notices and public hearings as well as formal congressional review of major policies—means that decisions can and will be made.

Procurement policy and regulation are highly technical and legalistic. A single interface with the private sector demands a single interpretation and uniformity of detail of what is both desirable from a policy standpoint and legal from a statutory standpoint. In the absence of a single directive authority in the executive branch, the statutory authority for procurement regulations is vested in a number of agencies—each capable of applying its own legal resources to interpret its separate statutory authority and mission objectives.

The result would be different actions by different agencies resulting in different requirements being laid on contractors. Demands for uniformity would be opposed on the basis of justifications which the individual agencies would find compelling.

The procurement system is dynamic and reflects ever-changing interpretations of laws, court decisions, and GAO reviews; changing missions of agencies; changing economic conditions; changing statutes; and changes in business practices and incentives. All create a need for modifying contract forms, clauses, and regulations. It is appropriate for Congress to establish basic principles in statute to guide Government procurement.

We believe that Congress normally has found it desirable when legislating for uniform implementation by agencies, to provide an accompanying grant of directive authority to supplement, interpret, and otherwise administer the statute. The authority given OFPP in Public Law 93-400 was in keeping with this normal congressional concern.

Our reading of the proposed legislation, Mr. Chairman, indicates that the administrator's authority to provide overall direction of procurement policy and to prescribe policies, regulations, procedures, and forms for use by all executive agencies in their procurement activities would be removed. However, we believe that the legislation you have introduced does provide the elements of control that are essential for achieving the objectives which we consider paramount.

As I understand the bill, it would provide essentially as follows:

In terms of policy initiation, OFPP will continue to have authority and responsibility to initiate administrative policy directives in conformance with the policies set forth in paragraphs 1 through 6 of section 2 of the act, and consistent with existing law. OFPP could issue the administrative policy directives only with the concurrence of the OMB Director.

We understand that it is intended that the administrative guidance to be issued by OFPP with OMB concurrence may include the detail generally characteristic of the guidance prescribed in OMB circulars.



The proposed legislation would provide OMB the authority to deny the effectiveness of any new or revised procurement regulation, in whole or in part, proposed for issuance by any Federal agency upon a finding that the regulation would be inconsistent with the administrative policies issued under the process described above. In practice, before an agency could issue a new or revised procurement regulation, it would be required to send the proposal for clearance to OMB. There would then follow a 30-day period of time for a finding and determination as to whether OMB should exercise its denial power.

Mr. Chairman, we believe the legislative proposal contains sufficient control authority, to be exercised during the interim period, to enable OFPP and OMB to move effectively toward the stated goals of one face to industry and improved efficiency in Government contracting. We note that under the legislation OFPP would be required to develop for submittal to the Congress a new, legislative-based, uniform procurement system under the schedule outlined. This uniform procurement system to be submitted to the Congress should include some unit or office with central authority to regulate in the procurement area after the Congress has passed the new law.

Under the legislation, the policy of directive authority of OFPP would not impair or affect the authority contained in the Federal Property Act with respect to the procurement of ADP, telecommunications equipment and services, or real property. The office would, however, include these subjects in its proposal for a legislatively based uniform procurement system.

Mr. Chairman, that concludes my prepared remarks. I would be pleased to answer any questions.

Mr. BROOKS. I want to thank you very much. We have a few questions.

In testimony before this subcommittee, the GAO outlined several problems with OFPP's procurement reform program. Among these were failure to develop needed legislation, failure to establish proper priorities, failure to assume leadership, and failure to maintain accountability.

Do you believe that H.R. 3763's redirection of OFPP, coupled with OMB's approval role, will help resolve these congressional concerns?

Mr. WHITE. Yes, sir. Obviously, we have some disagreement in perception with GAO as to exactly how much progress has been made. We are going to monitor that closely under the new legislation. I think we will be able to do that.

Mr. BROOKS. Is it possible to develop a truly simplified and uniform procurement system without substantial changes to existing statutes related to procurement?

Mr. WHITE. Yes, sir, I think so. There will be some changes obviously, but they do not have to be substantial, in my view.

Mr. BROOKS. But you would have to have legislation for substantial, major changes?

Mr. WHITE. Absolutely. Yes, sir. No question.

Mr. BROOKS. I understand that some OFPP officials maintain that their current effort to develop a single Federal acquisition regulation—FAR—will meet all the requirements for a simplified and uniform procurement system. Do you share this view?

Mr. WHITE. No, sir. I think it goes a very long way in that direction. But I think, in addition to that, we would need some legislative changes as well.

Mr. BROOKS. In a recent statement before the Senate Subcommittee on Federal Spending Practices and Open Government, Dr. Dale W. Church, Deputy Under Secretary of Defense, Research, and Engineering, severely criticized OFPP's performance during its first 4½ years of existence. One of the reasons he gave for this poor performance was OFPP's inclination to involve itself in matters that are peripheral to the contracting process or that concern the daily operational affairs of the agencies.

Do you think that H.R. 3763 will correct this misdirection of OFPP's resources?

Mr. WHITE. I think that the proposed legislation is very clear in terms of what it wants the main focus of OFPP to be, and that will be important in terms of achieving that goal.

Mr. BROOKS. As distinct from the OMB's role in day-to-day operations on occasion?

Mr. WHITE. Yes, sir.

Mr. BROOKS. It does not limit OMB's responsibility or authority in any way.

Mr. WHITE. That is my understanding, Mr. Chairman.

Mr. BROOKS. But they do not have that same responsibility and authority.

Mr. WHITE. That is right, Mr. Chairman.

Mr. BROOKS. Before you are a series of amendments to H.R. 3763 which are the result of discussions with OMB officials. They are designed to resolve concerns about curtailment of OFPP's directive authority during the 3-year interim period. Are these amendments satisfactory to you? Have you looked them over?

Mr. WHITE. Yes; I have looked at them very carefully. They are satisfactory; yes, Mr. Chairman.

Mr. BROOKS. If H.R. 3763 is amended to reflect these changes, would you fully support the bill?

Mr. WHITE. Yes, sir. As I indicated in my statement, I think we can perform the objectives for OFPP under the amended legislation.

Mr. BROOKS. Mr. Horton?

Mr. HORTON. Thank you, Mr. Chairman.

Mr. White, you emphasized in your statement the need for directive authority. Do you feel that this bill provides OFPP with enough directive authority to meet its goal?

Mr. WHITE. Yes, sir.

Mr. HORTON. What problems do you foresee in the management system to implement the uniform procurement system?

Mr. WHITE. I think, clearly, this is a very complex area. There is a vast array of regulations that are complex and specific. You need the continual oversight of a central office—in this case OFPP—to do that. I think that will continue to be a problem. It is largely a problem of getting the various agencies in Government to cooperate in terms of the single effort.

Mr. HORTON. Do you think under this bill, as proposed to be amended, that OFPP could accomplish that need?

Mr. WHITE. Yes, sir.



Mr. HORTON. How well do you feel that the executive agencies coordinate their procurement policies prior to the creation of OFPP? Do you find any improvement since OFPP?

Mr. WHITE. My understanding—and I was not involved in it, obviously—was that, before OFPP—and I knew this from studies and other sources—there was very little overall coordination between the various agencies. There has been a marked improvement in that coordination. One of the fundamental reasons has been the existence of OFPP and its statutory authority to require that kind of coordination.

Mr. HORTON. How much of the resources of OFPP are devoted to basic research in procurement policies and procedures?

Mr. WHITE. I would have to supply that for the record, Mr. Horton, but it is very modest.

Mr. HORTON. Do you feel it is too low or too high?

Mr. WHITE. We have had a review of that research effort in the course of the Federal Acquisition Institute, I think we are in quite good shape. This is an area that needs some research, but not an enormous budget by any means.

Mr. HORTON. The bill provides for a 3-year extension. What is OMB's position with regard to that?

Mr. WHITE. We think that that is an acceptable length of time to meet the objectives of the legislation.

Mr. HORTON. Do you feel that this bill, with the concurrence of the OMB Director, will permit the OFPP to accomplish its mission and work so that it can accomplish what it is supposed to do?

Mr. WHITE. Yes, Mr. Horton, I do.

Mr. HORTON. I do not have any further questions, Mr. Chairman.

Mr. BROOKS. The gentleman from Illinois, Mr. Erlenborn. Do you have any questions or comments?

Mr. ERLBORN. Mr. Chairman, thank you. I am sorry that I came in a bit late.

So far, the proposed amendments look good.

Mr. Chairman, I would like to ask who prepared the memo, the summary of H.R. 3763, Office of Federal Procurement Policy.

The reason I ask this is, on page 2 in the last paragraph, a noun has been made into a verb. If I read this right, it says, "OFPP also is tasked with other duties ancillary to the above functions."

I know over at the Department of Defense and some of the other agencies we have this tendency to make nouns into verbs and otherwise louse up the English language, but I did not think we were doing it in this committee.

Mr. BROOKS. We are trying not to. I appreciate the gentleman's craftsmanship as a draftsman.

Mr. ERLBORN. Thank you, Mr. Chairman. I am glad that is settled.

In reading the summary of the amendments, I think that they are a great improvement to the bill and will make the bill, I would hope, in this subcommittee and in our full committee noncontroversial and will promote the purposes for which OFPP was created. I am pleased with the chairman's decision to move in this direction.

Mr. BROOKS. Thank you very much.

The gentleman from Minnesota, Mr. Stangeland?

Mr. STANGELAND. Mr. Chairman, it is apparent that the chairman and the staff and the OFPP and the OMB have done a good job of negotiating. I have no questions.

Mr. BROOKS. Thank you.

The gentleman from Georgia, Mr. Levitas?

Mr. LEVITAS. I have no questions, Mr. Chairman,

Mr. BROOKS. Thank you very much for a good statement and for concise answers. That is an unusual thing, which will make you much loved here in Congress.

With your background, you should be able to know what the answers are. Then you have to use considerable restraint and judgment not to give members and people 30 minutes of dissertation on something when what they want is an answer to a fairly simple question. I think you handled that beautifully.

It is an attribute that many witnesses, many executives, many ranking members of this administration and all prior administrations that I have known of for the last quarter of a century have a hard time learning. You have mastered that.

I would say that, on your first hearing, you have done a beautiful job. We are delighted to have you here and will welcome you back.

Mr. WHITE. Thank you, Mr. Chairman.

Mr. BROOKS. The members recall that, in a hearing earlier on this legislation, Comptroller General Elmer Staats testified basically in favor of the bill but expressed some concerns about deleting all of the directive authority of OFPP. Following that hearing, I suggested some language to restore some directive authority very similar to that in the amendments I am proposing today.

On May 10, the Comptroller General wrote me a letter saying that, if H.R. 3763 were amended with that language, it would satisfy his concerns, and he would support the bill.

I ask unanimous consent to put the Comptroller General's letter in the hearing record.

We have several other statements to put in. I would ask unanimous consent to put one in from the Machinery and Allied Products Institute, the Associated General Contractors of America, the National Security Industrial Association here in Washington, and one from a law firm here on Casey, Scott & Canfield, among others.

[The material follows:]





COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

May 10, 1979

The Honorable Jack Brooks, Chairman  
Committee on Government Operations  
House of Representatives

Dear Mr. Chairman:

Members of your staff have been in contact with us concerning revisions to Section 6(h) of H.R. 3763 which I expressed concerns about during my testimony on May 3. I feel that if Section 6(h) were to read as follows, my concerns would be satisfied:

"(h) Until the effective date of legislation implementing a uniform procurement system, the Administrator may, with the concurrence of the Director of the Office of Management and Budget, issue policy directives, in accordance with applicable laws, in support of the development and implementation of a uniform procurement system."

This suggested language would satisfy my concerns that OFPP retain directive authority for policy matters, clarify the respective roles of the Administrator of OFPP and the Director of Management and Budget, and insure that directives issued are in accordance with existing law.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "James B. Stacks", is written over the typed name.

Comptroller General  
of the United States

PRESIDENT  
 CHARLES W. STEWART  
 VICE PRESIDENTS  
 HEVON C. MOHR ..... Chairman  
 Central Equipment, Syracuse, New York  
 HUGH D. LURE ..... Chairman  
 Alliance Heavy Equipment, Cleveland, Ohio

VICE PRESIDENT AND TREASURER  
 THOMAS F. RUSSELL ..... Chairman  
 Federal-Logan Corporation, Santa, Michigan

SENIOR VICE PRESIDENT  
 CHARLES L. GERR  
 VICE PRESIDENT AND SECRETARY  
 RICHARD E. HUGHES

ASSISTANT TO THE PRESIDENT  
 FRED E. SHAND  
 ASSISTANT SECRETARY  
 PAUL H. FRATT

STAFF COUNSEL  
 WILLIAM J. HEALEY, JR.  
 DONALD E. HARTSON  
 FRANCIS W. HOLLAND, JR.

ECONOMIST  
 A. E. VAN DER VOORT  
 ASSISTANT TREASURER  
 JACQUES A. SMITH

EXECUTIVE COMMITTEE  
 JOSEPH T. BAILEY ..... Chairman  
 The Robert & Thomas Company, Cleveland, Ohio  
 BERNARD J. BANNAN ..... Chairman  
 Motion Picture Corporation, London, England  
 JAMES E. BIRD ..... Chairman  
 Ford Motor Corporation, Chicago, Illinois  
 JOSEPH A. BORD ..... Chairman  
 Borden Corporation, Baltimore, Maryland  
 JOSEPH D. BRENNER ..... President  
 and International, New York, New York  
 ROBERT C. BUCK ..... President  
 Export Industries, Inc., New York, New York  
 W. PAUL COOPER ..... President  
 A. C. Cooper Corporation, Cleveland, Ohio

THOMPSON ..... Chairman  
 Atlas & Co., Inc., Indianapolis, Indiana  
 A. DE WINDT ..... Chairman  
 Atlas Corporation, Cleveland, Ohio  
 F. MITCHELL FORD ..... Chairman  
 Ford Motor Corporation, Detroit, Michigan  
 EDWARD J. GIBBY ..... Chairman  
 DeLco Corporation, Troy, Michigan  
 CHARLES F. HAUCK ..... President  
 Bluebonnet Corporation, Pittsburgh, Pennsylvania  
 JOHN V. JAMES ..... Chairman  
 and President, Pittsburgh, Pennsylvania  
 JOHN J. JEFFSON ..... Chairman  
 Motor Company, Worcester, Massachusetts  
 DAVID T. JENSEN ..... President  
 and Vice President, New York, New York  
 ROBERT V. KIRCHMAN ..... Vice Chairman  
 and President, New York, New York  
 J. PAUL LYET ..... Chairman  
 New York Corporation, New York, New York  
 ROBERT H. MAUST ..... Chairman  
 and President, Chicago, Illinois  
 ELBERT H. MEISE ..... President  
 and Vice President, Detroit, Michigan  
 BRUCE F. OLSON ..... Chairman  
 and President, Boston, Massachusetts  
 JOHN E. PARKER ..... President  
 and Vice President, Milwaukee, Wisconsin  
 M. F. PHILLIPS ..... President  
 and Vice President, New York, New York  
 ARTHUR J. SANDRY, JR. ..... President  
 and Vice President, New York, New York  
 HENRY D. SHARPE, JR. ..... Chairman  
 and Vice President, New York, New York  
 JESSE M. SHAW ..... Chairman  
 and Vice President, New York, New York  
 HARRY S. STONER ..... Vice Chairman  
 and Vice President, New York, New York  
 J. A. STOCKLAND, JR. ..... President  
 and Vice President, New York, New York  
 WILLIAM G. VANBERG ..... Chairman  
 and Vice President, New York, New York  
 E. J. WEAVER, JR. ..... President  
 and Vice President, New York, New York  
 WILLIAM L. WEAVER ..... Chairman  
 and Vice President, New York, New York  
 JAMES W. WELCOCK ..... Chairman  
 and Vice President, New York, New York  
 ROBERT C. WILSON ..... Chairman  
 and Vice President, New York, New York  
 GEORGE G. ZIPP ..... President  
 and Vice President, New York, New York

## MACHINERY and ALLIED PRODUCTS INSTITUTE

1200 EIGHTEENTH STREET, N.W. WASHINGTON, D.C. 20036 202-331-8430

May 8, 1979

RECEIVED

MAY 8 1979

Legislation and National  
Security Subcommittee

The Honorable Jack Brooks  
 Chairman, Subcommittee on Legislation  
 and National Security  
 Committee on Government Operations  
 U.S. House of Representatives  
 Washington, D.C. 20515

Dear Mr. Chairman:

### The Office of Federal Procurement Policy

In connection with the Subcommittee's consideration of your bill, H.R. 3763, and the current "sunset review" of the Office of Federal Procurement Policy (OFPP), we offer the views of the Machinery and Allied Products Institute. As you may know, the Institute represents the capital goods and allied product industries of the United States. Although the bulk of the companies in these industries sell primarily to the commercial rather than to the government market, many furnish products which are essential to the government, particularly in the national defense area. And these corporations have a deep interest in the procurement policies and regulations that are used by the federal government in connection with its purchases from private industry.

The "sunset review" of OFPP is occasioned by the Office of Federal Procurement Policy Act (Public Law 93-400), Section 11 of which authorizes OFPP appropriations only through the first five fiscal years of OFPP's existence, ending next September 30. Any appropriations for OFPP operations beyond that point must first be authorized by the Congress, and the Committee on Government Operations, of course, has jurisdiction over any such authorizations on the House side.

As to the issues currently before the Subcommittee, MAPI strongly supports the continuance of OFPP. We agree with the Chairman's comments that OFPP has injected itself into areas outside its statutory authority, at least with respect to one area--the development of the government contracts enforcement program for the President's voluntary wage-price guidelines. However, we believe that in most instances OFPP has exercised its current authority concerning procurement policy with energy, skill and in the public interest. Our evaluation of OFPP's performance to date precedes our comments on the bill.



A MAPI Perspective on OFFPPOFFPP's Record

In our view, OFFPP, under both its former Administrators, Lester Fettig and Hugh Witt, has made a substantial contribution to the improvement of the federal government's procurement policies generally.

We do not necessarily endorse all of the specific actions taken by OFFPP in its nearly five years of existence. We do think, however, that in practically every instance the action taken marked a perceptible improvement as to the issue addressed. In addition, we cite the following three "actions and accomplishments," referred to in OFFPP's most recent Annual Report to the Congress dated January 2, 1979, as matters in which MAPI is deeply interested and concurs with what OFFPP has done:

1. The emphasis placed on greater reliance on commercial products rather than those designed to meet government specifications--it appears that there has been some distinct progress in this area in response to OFFPP initiatives.
2. The issuance of OFFPP Policy Letter 78-2 to protect service contract professional employees against "wage busting" in lieu of trying to accomplish the same objective through further broadening of the scope of the Service Contract Act.
3. The issuance of OFFPP Policy Letter 78-3, on the application of the Freedom of Information Act requirements to government contracts.

In general, OFFPP has indicated a commendable tendency to "stand up" to the old-line departments and agencies of the federal government on matters involving procurement policy. We think that in this respect OFFPP has been acting in the manner intended by the Commission on Government Procurement and later confirmed by the Congress in the OFFPP Act.

An Emerging Problem--Preservation of the Proper Role of OFFPP

Although we think that OFFPP on the basis of its record of achievement to date should certainly be continued, we perceive an emerging problem with respect to ensuring that the role of OFFPP be limited to appropriate activities in the procurement area. Specifically it is our view that OFFPP, apparently at the direction of the President and the Director of OMB, at least to some degree is being called upon to support governmental programs and objectives of a nonprocurement nature. This, we think, is highly undesirable because it diverts OFFPP from its principal objective--the promulgation and improvement of procurement policy. In this connection, we recognize that the government contract instrument, independent of OFFPP, has been utilized--and we think abused--for socioeconomic objectives, however commendable

those objectives may be. Further, it is our view that the time has long passed when the country should put a stop to this. It is unnecessary in this context to catalog the numerous ways in which government contracts have been so utilized.

As for the role of OFPP, we repeat our concern that the procurement functions of OFPP should not be encumbered with participation by its Administrator and its office in certain governmental programs that, as we view it, are strictly nonprocurement in nature. The promulgation of the President's wage-price guidelines, already referred to, is a particularly pertinent illustration of this point. Although the guidelines have been loudly proclaimed to be voluntary in nature, the government contract is used as the vehicle for their enforcement.

To the extent that companies do not comply with the "voluntary" guidelines, they may be debarred under implementing OFPP regulations from future government contracts and subcontracts exceeding \$5 million in amount and their performance under existing contracts may also be terminated for the convenience of the government. In hearings conducted on the guidelines by the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Government Operations Committee, the General Accounting Office and the Congressional Research Service have both taken the position (with which we agree) that the President's guidelines lack the statutory basis cited by the guidelines. More specifically, these two legislative agencies have stated that the statute cited, the Federal Property and Administrative Services Act, when properly construed, does not authorize the President to use government contracts to enforce his anti-inflation program. Moreover, the GAO, through the Director of its Procurement and Systems Acquisition Division, made the point that, for many reasons, the use of the government contract to enforce the guidelines, even if held to be legal, raises serious questions from a policy viewpoint. Despite the very serious doubts which the GAO and CRS testimony raise concerning the role of government contracts in connection with the guidelines, OFPP has very strongly supported this policy. We assume that this is the case primarily because that is what the President and the Director of OMB expect OFPP to do.

On the other hand, unlike the situation in which we think procurement policy input has been improperly used, there are vitally important legislative issues arising on which procurement policy input should be a matter of paramount importance but has not been furnished, so far as we know. For example, the recent termination of the Renegotiation Board raises the question of the application of the Vinson-Trammell Act, now 35 years old. On this issue, the Department of Defense has strongly urged the repeal of the Vinson-Trammell Act as being completely outmoded and undesirable, in any event, from a policy viewpoint. Despite all of this, OFPP--so far as we know--has been publicly silent on the matter. We recognize, of course, that OFPP may have been involved in internal governmental deliberations on these matters.

In brief then, we recommend that OFPP should concentrate its attention on basic procurement policy questions--both in themselves and as they relate to major issues pending before the Congress or the Executive



branch of the government. However, we do not recommend statutory changes in the OFPP Act to accomplish this objective, for example, by amending the law to make OFPP more independent from direction by the President and the Director of OMB. We feel that no action should be taken to weaken OFPP's ability to deal effectively with the other departments and agencies within the Executive branch (a matter on which, we have already noted, we think OFPP has done an outstanding job). On the other hand, we do urge the Subcommittee, in its report on these hearings, to strongly urge the President and the Director of OMB to exercise more forbearance and understanding than we think they have up to this point as to the proper and appropriate functions of OFPP and to appraise the duties and assignments given to OFPP in light of these functions.

#### Comments on the Bill

Our comments on the bill, which follow, reflect our evaluation of the OFPP performance to date.

#### OFPP's Directive Authority Should Be Continued

As we view it, the most basic change made by the bill would be the amendment of Section 6(a) of the Act to delete the Administrator's authority to "provide overall direction of procurement policy." Under the proposed revision, the Administrator instead would be required to "provide overall leadership in the development and implementation of procurement policy and coordination of programs to improve the quality and performance of procurement personnel."

The loss of the Administrator's "directive" authority would be crucial.<sup>1/</sup> It involves, of course, the question of policy formulation involving the major Executive branch organizations with responsibilities in the procurement area. Perhaps even more importantly, the directive authority makes it possible for OFPP to challenge such "outside" organizations as the Department of Labor when they have taken or contemplate

<sup>1/</sup> See the statement of Elmer B. Staats, Comptroller General of the United States, before the Subcommittee. Mr. Staats said:

The bill [H.R. 3763] would shift the primary emphasis for the next 3 years from one of policy direction to one of leadership in policy development. Instead of establishing and prescribing policy and regulations for the Federal agencies, OFPP's role for the near future would be to develop a uniform procurement system to be implemented by the Congress.

I am concerned about the general thrust of the bill which would take away from OFPP overall directive authority over procurement policies, regulations, procedures, and forms. . . .

actions which have a significant impact on federal procurement policy. In our judgment, the substitution of a "leadership" advisory role for the current "directive" authority would have made impossible some of the significant accomplishments of OFPP in the past. Further, we seriously doubt that such a change in authority would have done much to alleviate the problems connected with OFPP which are of concern to the Chairman and, as we have noted, have troubled us.

#### The "Contracting Out" Problem

The bill would delete the present Section 6(d)(3) of the Act which states that among the Administrator's functions is that of "monitoring and revising policies, regulations, procedures, and forms relating to reliance by the Federal Government on the private sector to provide needed property and services."

As you know, OFPP recently completed a major revision of OMB Circular A-76, "Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government," the federal policy directive governing the "contracting out" issue. Although we do not necessarily agree with every aspect of the revised Circular A-76, we think that its basic thrust merits support, and we believe that the continuance of a monitoring function for OFPP concerning departmental or agency compliance with the new policy is definitely in the public interest. For that reason, we think that OFPP's responsibility with respect to contracting out should be continued and we are opposed to the deletion of Section 6(d)(3) of the Act.

#### OFPP Responsibility Concerning COGP Recommendations

We endorse the proposed revision of Section 6(d)(1) to expressly direct the Administrator to review the recommendations of the Commission on Government Procurement to determine which should be completed, amended, or rejected. The Comptroller General and the General Accounting Office have been closely monitoring action on the COGP recommendations over the last several years. They have strongly urged, before both this Subcommittee and the Senate Governmental Affairs Subcommittee on Federal Spending Practices and Open Government, that OFPP accord a higher priority with respect to completing work on the balance of the Commission's recommendations which have not yet been acted upon. We agree that a statutory mandate to that effect may now be in order and support that provision.

#### Three Years Is Too Short a Term for OFPP To Finish Its Job

The bill would amend Section 11 of the Act to provide a \$3 million authorization for OFPP for Fiscal Year 1980 and for each of the two succeeding fiscal years. Although the "sunset" concept which has been applied to OFPP seems useful, we think that the prospective three-year additional term for OFPP is too short. The original authorization for OFPP gave it a five-year



term, and we agree with the Comptroller General that the renewal should be at least for an additional five-year term. It seems to us that with the projects now under way and with the likely assignment of additional work to OFPP, a three-year term is not realistic in the light of what OFPP is expected to get done and its need to attract and hold competent and professional staff.

\*

\*

\*

This completes our comments in connection with the review of the Office of Federal Procurement Policy. If we can be of further assistance, please let us know.

Sincerely

*Charles Stewart*

P r e s i d e n t

mfm

**THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA**

1957 E Street, N.W. Washington, D.C. 20006 (202) 393-2040 TWX: 710-955-1134 AGC AGTN

PAUL N. HOWARD, JR., President

RAL R. CIANCHETTE, Senior Vice President

THOMAS E. DAILEY, Vice President

CLIFF MORTENSEN, Treasurer

JAMES M. SPROUSE, Executive Vice President

HUBERT BEATTY, Executive Director

## STATEMENT OF

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO THE SUBCOMMITTEE ON

LEGISLATION AND NATIONAL SECURITY

OF THE HOUSE COMMITTEE ON

GOVERNMENT OPERATIONS

ON THE PROPOSED CONTINUATION OF THE

OFFICE OF FEDERAL PROCUREMENT POLICY



The Associated General Contractors of America and its 113 chapters nationwide is comprised of approximately 30,000 firms, including more than 8,000 of the nation's leading general contracting companies that perform more than \$100 billion of construction annually. AGC certainly has an interest in the Office of Federal Procurement Policy and we appreciate this opportunity to present our views to you.

Included in the "Declaration of Policy" contained in Public Law 93-400 which established the Office of Federal Procurement Policy were statements that it was the policy of Congress to: utilize competitive procurement methods to the maximum extent practicable; avoid or eliminate unnecessary or redundant requirements placed on contractor and Federal procurement officials; achieve greater uniformity and simplicity, whenever appropriate, in procurement procedures; coordinate procurement practices and programs of the several departments and agencies; minimize possible disruptive effects of Government procurement on particular industries, areas, or occupations; promote fair dealing and equitable relationships among the parties in Government contracting; and to otherwise promote economy, efficiency, and effectiveness in Government procurement organizations and operations.

As the key trade organization in the construction industry, which is the number one industry in the United States accounting for more than 10 percent of the Gross National Product and from which the Federal government, directly and indirectly, purchased in excess of \$20 billion last year, the Associated General Contractors of America applauded the establishment of the OFPP and the purpose for which it was created.

We were pleased to see the creation of an entity which would be staffed with specialists in procurement who would not have preconceived biases when reviewing procurement policies or problems. Our experience in trying to resolve difficulties in procurement procedures with the various agencies and departments is their inherent reluctance to change any rule or regulation which that particular agency or department has developed. We believe that OFPP has brought a breath of fresh air to the procurement process.

During the four and one half years the OFPP has been in existence we have seen a number of recommendations and regulations issued by the OFPP which we believe have resulted in an improvement of the procurement of construction by the Federal government. Among these improvements are:

- 1) The work begun on the "Federal Acquisition Regulation," a single set of contracting regulations to replace the more than 800 sets currently in use;
- 2) The revision of OMB Circular A-76 relative to greater implementation of the Federal government's reliance on the private sector for goods and services. The revisions provide for a more effective and equitable implementation of the policy with a more realistic recognition of the "overhead" costs charged against the work done by in-house Federal workers when being compared to estimates secured from the private sector for the same work, and;
- 3) The securing of more equitable provisions in Public Law 95-563, the Contract Disputes Act of 1978.



However, much remains to be achieved before the declarations of the policy as contained in P.L. 93-400 are realized. Included in this category are some of the proposals contained in the Recommendations of Study Group 13-C (Construction) of the Commission on Government Procurement.

We commend the OFPP for the progress that has been made in implementing a number of recommendations of the Study Group but we urge that OFPP take steps to affect the following numbered recommendations:

5. Performance and Payment Bond Premiums -- that the government pay performance and payment bond premiums to the contractor on his submission of a receipted invoice.
6. Mobilization Payments -- that agencies' regulations be altered to require mobilization payments to contractors in all Federal construction contracts requiring more than one construction season for accomplishment.
8. Two-part Change Orders -- that the Federal Procurement Regulations and the Armed Services Procurement Regulations be amended to make use of the two-part change order mandatory when requested by the contractor to enable partial payment for ordered changes.
9. Availability of Professional Opinions on Sub-Surface Conditions -- that Federal Procurement Regulations be modified to provide for the disclosure of such professional opinions regarding the subsurface conditions as the contracting officer deems to be relevant.
10. Limitation of Warranty -- that a standard Federal warranty be used which would (a) limit the construction contractor's

liability to one year from the time the government takes possession of the work, (b) eliminate liability for consequential damages and (c) spell out that there is no warranty of government designs.

12. Labor Recommendations -- that the Davis-Bacon Act be repealed. If not repealed, amend the Act to facilitate reasonable administration.
13. Environmental Requirements -- that a full definition of known environmental protection requirements be included in the bidding documents by specification or reference for construction contracts.
14. Listing of Subcontractors -- that no action be taken through Federal law or regulations to require listing of subcontractors at the time of bidding.
15. Truth in Negotiations Act -- that the appropriate section of Federal Procurement Regulations be revised by substituting instructions applicable to the construction industry.
16. Elimination of Construction from the Set-Aside Program -- that Federal construction be excluded from the Small Business Set-Aside Program.
18. Publishing the Engineer's Estimate -- that Federal agencies publish the lump sum total of the engineer's estimate at the time of publicly advertising competitively bid construction work over \$5 million.
20. Establishing the Cost of Changes -- that the appropriate sections of the FPR's and ASPR's be amended to require that the cost of changes include all allocable indirect costs, the allocations being made according to generally accepted accounting principles.



AGC recognizes, however, in calling for the implementation of the above recommendations of Study Group 13-C that we cannot expect the OFPP to drop everything else it is doing to concentrate on the construction industry.

It is readily apparent that in making such requests we believe adequate funds should be authorized to enable the OFPP to proceed with its good work. There is a continuing need for an Office which specializes in improving the procurement policies of the Federal government, not only from the government's view but from the contractor's view as well. We believe that the OFPP has responded to the needs of government, the contractor and the taxpayer fairly and with respect to the individual concerns of each.

In addition to urging the continuation of the OFPP for implementation of the Study Group's recommendations, we urge the further funding of OFPP to enable it to carry out the functions it has recently been assigned by Congress, namely:

- 1) in P.L. 95-563, the Contract Disputes Act, to draw up uniform rules and procedures, and;
- 2) in P.L. 95-507, the Small Business Act, to draw up uniform subcontracting procedures.

In speaking for the continuation of the OFPP, however, we urge that proper consideration be given to the size and importance of the construction industry and the importance of the procurement of construction by the Federal government. Currently, less than one half of one staff member's time is devoted to construction procurement

matters. We respectfully request that the Committee recommend adequate financing of the Office of Federal Procurement Policy to allow for appropriate staff priority consideration of the construction industry.

We appreciate the opportunity to provide you with our views on the Office of Federal Procurement Policy.





# NATIONAL SECURITY INDUSTRIAL ASSOCIATION

## National Headquarters

Union First Bank Building, Suite 700  
740 15th Street, N.W.  
Washington, D.C. 20005  
Telephone: (202) 393-3620

I. K. Kessler  
Chairman, Board of Trustees  
J. R. Lien  
Vice Chairman, Board of Trustees  
Chairman, Executive Committee  
S. A. Conigliaro  
Vice Chairman  
Executive Committee  
W. H. Robinson, Jr.  
President

1 May 1979

GOVERNMENT OPERATIONS

RECEIVED

MAY 4 1979 MAY 3 1979

Legislation and Subcommittees

The Honorable Jack Brooks  
Chairman  
House Government Operations Committee  
2449 Rayburn House Office Building  
Washington, DC 20515

Dear Mr. Chairman:

It is my understanding that your Committee intends to hold hearings on 3 May with respect to H.R. 3763, "Office of Federal Procurement Policy Act Amendments of 1979." The National Security Industrial Association (NSIA) provided Senator Chiles, Chairman, Senate Subcommittee on Federal Spending Practices and Open Government, industry views concerning the performance of the Office of Federal Procurement Policy (OFPP) over the past 4 1/2 years, especially, with respect to whether the Office should be continued after evaluation under the "Sunset" provision of Public Law 94-400, which created the OFPP.

NSIA's essential purpose is to foster good two-way communications between government and industry in the interest of assuring the maintaining of a healthy, strong, innovative and competitive defense industry base as a vital component of National Security.

In our view, the OFPP has demonstrated, over this time period, its ability to address many problems in the acquisition process which could not have been undertaken without the central focus afforded by the OFPP. Prominent in the list of initiatives of the OFPP are:

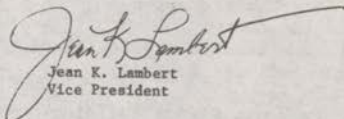
- o Improvement of major systems acquisition through the implementation of OMB Circular A-109.
- o Emphasis on reliance on the private sector through proposed major revisions to OMB Circular A-76.
- o The consolidation and simplification of the regulatory system for federal contracts through the drafting of a single Federal Acquisition Regulation.

None of these complex and weighty problems, in our opinion, could be effectively addressed by individual acquisition agencies and/or departments. Such matters require an overview and evenness of policy that only a single authority, such as the OFPP, provides.

Accordingly, we strongly urge the continuance of the OFPP, not only to continue the work that it has already so satisfactorily undertaken, but to be available to address significant issues in the acquisition process in the years to come. We believe that this will not only result in a more salutary acquisition process, but will result in considerable cost savings to the Government by eliminating unneeded and excessive regulations.

We believe that the OFPP should be commended for its accomplishments and attempts to stay within the charter as authorized by Public Law 93-400. We urge that re-authorizing legislation be introduced into the Congress that would continue the OFPP within the scope of its original charter. Such re-authorization legislation should embody a policy of reducing the regulatory cost in the Federal Acquisition process.

Sincerely,



Jean K. Lambert  
Vice President

JKL/AFB/md



*Casey, Scott & Canfield*  
Attorneys at Law

*Joseph E. Casey  
Edward F. Canfield  
Richard L. Harrell  
Joseph D. Crumlish  
Robert C. Heggstad*

*420 Washington Building  
1435 G Street, N.W.  
Washington, D. C. 20005  
(202) 229-3750*

April 27, 1979

Mr. Elmer W. Henderson  
Staff Director  
House Subcommittee on Legislation  
and National Security  
Room B 373  
Rayburn House Office Building  
Washington, D. C. 20515

RECEIVED

MAY 1 1979

Legislation and National  
Security Subcommittee

Dear Mr. Henderson:

I wish to express my views with respect to my understanding of the posture of the Office of Federal Procurement Policy (OFPP) in one facet of its many duties.

The Federal acquisition process needs a coordinating point to bring into focus national issues of procurement policy. OFPP has served that objective well in several areas.

There is one area in which OFPP may be creating problems unnecessarily. In executing its responsibilities under the Contract Disputes Act of 1978, 5 U.S.C. 5108, it appears to many in the community of public contract law that OFPP is assuming the duties of Chief Judge without the legal sensitivities to litigants' problems which the Bench develops.

The Act seems to give OFPP the right to allocate high level civil service positions on the basis of relative case load.

It is our understanding that OFPP has interpreted this allocation function as authority to reform the entire system of Contract Boards of Appeal across the various

agencies of government.

Such a reformation may prove ultimately to be logical, but should never be attempted without care and deliberation. The practicality of such a move at this time is highly doubtful. The allocation of judicial manpower is one of the more difficult tasks for experienced and able legal administrators. It cannot be done by a numerical count of cases because a case load has qualitative as well as quantitative characteristics.

The current several Boards of Contract Appeals have grown in response to requirements within their respective agencies. Each has a distinct history. Each tends to handle controversies which to some extent are peculiar to the agency concerned. Although the Federal Court System labors under the burden of a Judge who must in serial fashion decide personal injury cases, contract cases, income tax cases, and any dispute within his jurisdiction, expeditious and informal settlement of contract disputes cannot be achieved following that example. Traditionally, hearing examiners and administrative law judges have tended to be most useful both by having experience and knowledge of the duties of the agencies in which they operate. Obviously, a knowledge of highly technical equipment procurement is more useful in NASA than in deciding financial disputes under a HUD apartment subsidy program. Computers and software have also been difficult for our traditional legal forum.

If there is some benefit to be gained by gradually modifying the Boards to broaden the background of the current sitting members, that should be taken into consideration. But, I strongly urge that no board be abolished merely on the basis of projected efficiency unless careful study of the results upon appellants is made first. Rather than face hearing examiners who have no background in the agency or knowledge of the type of dispute to be decided, the only safe course for counsel would be to resort to the Federal Court system. This certainly was not the purpose of Congress in enacting the Contract Disputes Act.



As another example of the hasty action of OFPP, one can point to the decision to issue "final interim rules of procedure" to be adopted by every agency. This may be a valid exercise of OFPP's power, but the statute involved merely says:

"The rules of each agency Board shall include a procedure for the accelerated disposition of any appeal . . . ."

It appears to me that Congress intended the agencies to promulgate the rules of procedure, not OFPP. OFPP believes that its authorization to issue "guidelines" with respect to criteria is the same as the issuance of detailed rules of procedure. I personally, as counsel for appellants, would be more satisfied with rules promulgated by experienced judges and guidelines from OFPP rather than detailed rules from OFPP alone.

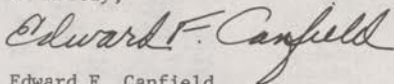
It is also the impression of some in the community of public law practice that OFPP has failed to consult with the agencies despite the fact that it has no special background in the judicial process. I cannot emphasize the necessity for actual practice before a Board or the Courts as a mandatory requirement before one is permitted to alter existing channels for the adjudication of rights which have resulted from the experience of many years.

In conclusion, while complimenting the extensive work that OFPP has undertaken in procurement policy, I urge that reformation of the appeals procedure for settlement of controversies be undertaken primarily by the agencies involved with the assistance of OFPP. The long history and expert knowledge of the products and services handled by their respective agencies are valuable assets of the several boards of contract appeals. Great care should be exercised that in attempting to obtain efficiency, the rights of appellants to expedited hearings before capable members of the various boards will not be sacrificed.

I shall be happy to appear personally to urge these matters if it would be helpful to your members for me to do so.

I request that this letter be made a part of the record of the House Subcommittee. Enclosed, therefore, are ten copies for this purpose.

Sincerely,

A handwritten signature in cursive script, reading "Edward F. Canfield". The signature is written in dark ink and is positioned above the printed name.

Edward F. Canfield

Enclosures



May 2, 1979

The Honorable Jack Brooks  
Chairman  
Committee on Government Operations  
U.S. House of Representatives  
2157 Rayburn House Office Building  
Washington, D.C. 20515

Dear Mr. Chairman:

I am pleased to provide you with my views on H.R. 3763. As you know, we testified earlier on a similar proposal in the Senate concerning the extension of OFPP's life and functions. The views which are incorporated in this letter focus primarily on the differences between your bill and that which was proposed in the other Chamber.

In your cover letter you commented that "OFPP has spread itself too thin". We agree with this conclusion and offered these comments:

"The size of the Agency appears to be generally acceptable. Its current staffing level forces a discipline on the Agency which is important in issue selection so that the main stream of activities are channeled into those things which are of the greatest importance on a Government-wide basis in policy areas. There may be from time-to-time, temporary resource supplements for large projects, such as the Federal Acquisition Regulations. These should be sought and supplied by the Congress on the year-to-year appropriations. We do, however, have a concern that Congress may mandate responsibilities for issues without concomitant resources and we encourage your Committee, to be sensitive to the potential overload which could be created for OFPP, which could strain their resources and force a dilution in their activity level, such that it would become a bureaucratic farce."

Thus, the amendments you propose have anticipated our concerns and appear to solve the problem.

I would like, now, to focus on specific provisions in your bill about which we have positions. To begin with specific provisions of your amendments, Paragraph 6(d)(1) of the Act concerns recommendations of the Commission on Government Procurement, we have stated:



CBEMA spoke to the subject covered by Section 6(d)(1) of the Act as amended as follows:

"OFPP has been charged with the implementation and fostering of the recommendations of the Commission on Government Procurement. There remain, unfinished, a number of recommendations which need attention. We suggest these recommendations be re-examined, to determine whether they should be completed; whether they should be updated and then completed; or whether time has passed by the need for the recommendation, and the recommendations simply should be cleared from the board. In this area, OFPP should address the problem and deal with each of the recommendations so as to complete any required action on the products of the Commission on Government Procurement."

Regarding Section 6(d)(2) of the Act, as amended, we have noted that there is a need for a thorough review and revision of the policy which is the underpinning for a uniform set of Federal Acquisition Regulations. We are supportive of this amendment requiring a system, rather than a consolidation of current practices.

On the subject of public participation, called for in Section 6(d)(3), we stated:

"A key strength of OFPP, from our perspective, has been the participation allowed and encouraged in the exploration and formulation of public policy. From the point of view of our industry, we are satisfied that the coverage of public participation is sufficient. Self-interest, however enlightened, by itself could be injurious; but OFPP has sought out and received differing points of view on all issues with which we are familiar, and has drawn these together in assessing the final direction for policy regulation. The timing of this participation also seems to be quite acceptable since the interests that have been identified with policy issues are invited into the process early enough to be effective and to encourage thoughtful participation."

And thus, we feel that the amendment accomplishes the objective of adequate public participation.

Regarding Section 6(d)(4), we concur in your objectives, but would like to suggest that specific language may be needed to guide OFPP in the types of research which we feel are currently deficient in their activity. Therefore, I offer the following:

"Comment has been made concerning the lack of research and development on the part of OFPP. We agree that there needs to be, within the current acquisition process, adequate market research about the industries and products with which contracting officers are dealing. We support the recent efforts by OFPP directed toward requiring agencies

to do a more effective job of surveying the various products, distribution systems, and other factors of different industries before determining which will be the most cost-effective acquisition technique for the Government on a specific class of items. In future activities, OFPP should be encouraged to increase their effort in market research and to utilize the results of this research in the drafting of policy and regulations, and in the training of contracting officers. We feel that this will help preclude the abuses, or perceived abuses, which have been so widely publicized over the last few months.

An area which we feel is critical to our industry and to the health of the country is the need for OFPP to recognize in its R&D, in its training efforts, and in its general management functions, the need to create incentives for the inspiration and introduction of innovative new technology into Government. We hope that this will be an initiative which OFPP will undertake and which will separate itself in technique, concern and activity from many of the mature and stable activities and products for which OFPP is responsible. We support the efforts of OFPP to keep Government current and an active partner, through its acquisition activities, in the promotion of American industry."

In reading Section 6(d)(6), we are encouraged by your support of the Federal Acquisition Institute and, as in our comments on research, we feel that specific direction needs to be given concerning the introduction of new technology and products into the Government procurement process. We offer the following thoughts:

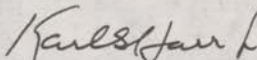
"The Federal Acquisition Institute is a much needed organization which will bring to bear the multitude of training activities, facilities and knowledge within the Federal establishment. We are concerned, however, that the concentration on Federal regulations and policy solely, does not prepare many of the contracting officers to handle procurements for which assignments are made. In short, many of these contracting officers are not trained in the technologies and products which they procure and, therefore, cannot be as effective as they ought to be in assuring that the overall best interests of the Government are being served when they conduct procurements. We hope that, in the future, OFPP can work to alleviate this problem."

Finally, regarding the major change from a directive to a primarily advisory role, we interpret Section 6(h) of the Act to give the authority to OFPP, through the auspices of OMB, to ensure that the current procure-

In short, while we as manufacturers have not always agreed with everything the OFPP has done, we feel it has a worthwhile role to play and is deserving of the support of those interested in improving and reshaping the nation's procurement policies.

Thank you for considering our views.

Yours very truly,



Karl G. Harr, Jr.

47-551 125

ment system is consistent with, and in support of, the uniform procurement system to be recommended by OFPP, until such time as the UPS is reviewed, approved, and implemented.

In general, we support H.R. 3763 and offer our cooperation and services to achieve the goals which you have set within these amendments. If we can be of further assistance in providing our views, or in working with you in support of the legislation, please feel free to call upon us.

Very truly yours,



Vico E. Henriques  
President

VEH/rkl





## AMERICAN BAR ASSOCIATION

SECTION OF PUBLIC  
CONTRACT LAW

WRITER'S ADDRESS AND TELEPHONE

1700 K Street, N.W.  
Washington, D. C. 20006  
(202) 833-1420

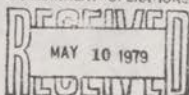
RECEIVED

MAY 14 1979

May 9, 1979

Legislation and National  
Security Subcommittees

GOVERNMENT OPERATIONS

1978-79  
CHAIRMAN  
George M. Cohn  
1700 K Street, NW  
Washington, DC 20006  
202/833-1420CHAIRMAN-ELECT  
Theodore M. Kostas  
2300 Two Girard Plaza  
Philadelphia, PA 19102  
215/569-4530SECRETARY  
Carl L. Vachetta  
1828 L Street, NW  
Washington, DC 20036  
202/785-5153SECTION DELEGATE  
Marshall J. Dow, Jr.  
4200 Republic National Bank  
Dallas, TX 75201  
214/742-1021IMMEDIATE AND PREVIOUS  
PAST CHAIRMAN  
Alan J. Joseph  
600 Montgomery Street  
San Francisco, CA 94111Roy S. Mitchell  
600 New Hampshire Avenue, NW  
Washington, DC 20037COUNCIL MEMBERS  
Ruth G. Burg  
200 Stovall Street  
Alexandria, VA 22302C. Richard Boehert  
2320 Great Falls Street  
Falls Church, VA 22046Roger N. Boyd  
1100 Connecticut Avenue, NW  
Washington, DC 20036Paul G. Dembling  
441 G Street, NW  
Washington, DC 20548David L. Hirsch, III  
One Golden Store  
Long Beach, CA 90802Charles B. McInerney  
630 Fifth Avenue  
New York, NY 10020Austin G. Rhee  
200 Stovall Street  
Alexandria, VA 22302Thomas B. Treacy  
115 Broadway  
New York, NY 10006Robert D. Wallick  
1250 Connecticut Avenue, NW  
Washington, DC 20036EDITOR, PUBLIC CONTRACT  
LAW JOURNAL  
Paul Shnitzer  
441 G Street, NW  
Washington, DC 20548EDITOR, PUBLIC CONTRACT  
NEWSLETTER  
Martin J. Henry  
9926 Rand Drive  
Borne, VA 22015YOUNG LAWYERS DIVISION  
REPRESENTATIVE  
Carolyn B. Lamm  
2101 Connecticut Avenue, NW  
Washington, DC 20008LAW STUDENT DIVISION  
REPRESENTATIVE  
Michael R. Charness  
1700 K Street, NW, #1100  
Washington, DC 20006BOARD OF GOVERNORS  
LIAISON  
Albert E. Jenner, Jr.  
One IBM Plaza, #4400  
Chicago, IL 60611SECTION ADMINISTRATOR  
Marilyn Nefores  
American Bar Association  
1155 East 60th Street  
Chicago, IL 60637  
312/947-3961The Honorable Jack Brooks  
Chairman, House Government  
Operations Committee  
U. S. House of Representatives  
2157 Russell House Office Building  
Washington, D. C. 20515

Dear Mr. Chairman:

Due to a conflicting commitment, I was unable to accept the invitation to testify on behalf of the American Bar Association in connection with H.R. 3763, to amend the Office of Federal Procurement Policy Act. However, I have been advised that the views of the ABA could be submitted in a letter, which would be made a part of the record of the hearings.

This letter is submitted on behalf of ABA by authorization of S. Sheperd Tate, President of the American Bar Association.

On March 9, 1979 I appeared before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs to express ABA's strong support for the reauthorization of the Office of Federal Procurement Policy for another five years. We also asked that Congress, in the reauthorization legislation, mandate a two-year study and report to Congress by the Office of Management and Budget, of whether a 3 to 5 person policy board or commission appointed by the President with Senate confirmation and representing the affected governmental, private and public interests would be a more responsive and effective way to formulate acquisition or procurement policy. We also urged the strengthening of the opportunity for public participation in the development of acquisition policy. A copy of our statement to the Senate Subcommittee on S. 756, attached,

contains our detailed views in support of the renewal of OFPP on substantially the same terms as now set forth in P.L. 93-400.

We note that H.R. 3763 would reauthorize OFPP on terms essentially different from Public Law 93-400. As we understand H.R. 3763, it would remove the authority of the Administrator for Federal Procurement Policy to direct and prescribe procurement policies. Instead, he would serve as a developer and coordinator of a "uniform procurement system" that would be submitted to Congress for enactment. Then, under this concept, the implementation and enforcement of that system would be carried out by other agencies under a central "management system" which the Administrator would develop and propose to Congress for enactment.

The American Bar Association questions this radical change in the purpose and structure of OFPP. We believe this change would be entirely contrary to the Report of the Commission on Government Procurement and the recognized need for an effective Administrator and OFPP along the lines established by Public Law 93-400.

It is essential that a single office in the Executive Branch have the authority and responsibility for the establishment of uniform procurement policies, regulations, procedures, and contract forms and clauses that apply throughout the Executive Branch. It is equally imperative that private groups and public interest groups be accorded a meaningful opportunity to participate in the development of such policies, regulations, procedures, and forms.

In our opinion, these objectives are less likely to be achieved under the provisions of H.R. 3763. An underlying premise of H.R. 3763 is that Congress should enact or approve the details of a "uniform procurement system." We question whether Congress, without procurement policy direction of the executive procurement agencies either by OFPP or by a new procurement policy board or commission, could effectively legislate the myriad of detail that would encompass the contemplated "uniform procurement system."

Moreover, to now remove the directive authority vested in the Administrator under Public Law 93-400 would

seriously affect the stability in Government procurement policy that has been achieved by OFPP over the past 4-1/2 years, and undermine, if not eradicate, the many important projects that are in process. We note, in particular, the OFPP project to develop Government-wide Federal Acquisition Regulations which would replace the ASPR and FPR. We believe this activity is vital to improvement of Government procurement, and have worked diligently to review and comment on the draft regulations issued by OFPP for public comment.

Although H.R. 3763 would retain, as a function of the Administrator, the responsibility for "developing a system of simplified and uniform procurement policies, regulations, procedures, and forms" (Section 4(c)), other provisions of H.R. 3763 appear to remove the Administrator's authority to require the contracting agencies to conform to policies, regulations, procedures, and forms developed by OFPP. See, for example, Section 4(c) which amends Section 6(d) of the Act, and provides that the Administrator is to develop "for inclusion in the uniform system to be submitted [to Congress], standard contracts and contract language . . . ." Section 4(d), which amends Section 6(e) of the Act by deleting the authority to prescribe policies and regulations, Section 4(e) which adds a new subsection 6(h) that only authorizes the Administrator, with the concurrence of the Director of OMB, to "issue policies to ensure that promulgation of policies, regulations, and forms by executive agencies is consistent with and in support of the development and implementation of the uniform procurement system," and Section 8 which amends Section 12(a) of the Act by deleting the Administrator's authority "to prescribe policies and regulations." (Emphasis added). Also, Section 6 of H.R. 3763 revises Section 10 of the Act in a manner that appears to continue ASPR, FPR, and contracting agency policies, regulations, procedures, and forms in effect on the date H.R. 3763 is passed, until repealed or superseded by the uniform procurement system enacted by Congress.

We also question the need for or desirability of another study to make recommendations for changes in legislation relating to procurement by executive agencies, as



provided for in Section 5 of H.R. 3763. The Procurement Commission's recommendations for revising the statutory framework for procurement have been examined over a period of years, and have been generally endorsed by the Executive Branch, as well as the public sector. The ABA has studied the Commission's recommendations for revising the procurement laws and, by resolution of its House of Delegates, endorsed both the need for consolidation and revision of the Federal procurement statutes. In 1976 the ABA adopted a resolution, copy attached, endorsing in principle the concepts and goals of what was then S. 3005, the Federal Acquisition Act of 1976. Since then, as you know, there have been several iterations of S. 3005, the most recent being S. 5, introduced by Senator Chiles on January 15, 1979. It is our view that the need for significant revisions to the existing procurement statutes have been fully explored and justified.

Although ABA opposes H.R. 3763 to the extent it eliminates the directive authority of the Administrator of Federal Procurement Policy with respect to procurement policies, regulations, procedures, and forms, we support the provisions which would add to the Administrator's functions responsibility for completing action on pending recommendations of the Commission on Government Procurement, locating the Federal Acquisition Office in OFPP, and providing that it will be under the direction of the Administrator. (Section 4(c)).

The Procurement Commission submitted its Report to the Congress in 1973. Although some of the major recommendations of the Commission have been implemented, the majority have not been acted upon. Elevating to a statutory level the responsibility of the Administrator for completing Executive Branch positions on the Commission's recommendations, and proposing legislation where required, is desirable to ensure a systematic follow-up on the Commission's Report. Emphasizing the importance of research in procurement areas and efforts to upgrade the procurement work force, through the use of Federal Acquisition Institute, also are positive steps to improving Government procurement.

In view of the major responsibilities of the Administrator and the importance of the work yet to be done, we strongly urge extending the OFPP for five years, and retention of its directive authority.

Very truly yours,

*George M. Coburn*  
George M. Coburn  
Chairman, Public Contract  
Law Section  
American Bar Association

Enclosures:

ABA Statement  
ABA Resolution

cc: All Committee Members  
Marshall J. Doke, Jr.  
O. S. Hiestand, Jr.  
David L. Hirsch, III  
Robert D. Wallick



AMERICAN BAR ASSOCIATION

GOVERNMENTAL RELATIONS OFFICE • 1800 M. STREET, N.W. • WASHINGTON, D.C. 20036 • (202) 331-2200

STATEMENT OF

GEORGE M. COBURN

on behalf of the

AMERICAN BAR ASSOCIATION

before the

SUBCOMMITTEE ON FEDERAL SPENDING PRACTICES AND OPEN GOVERNMENT  
COMMITTEE ON GOVERNMENTAL AFFAIRS  
UNITED STATES SENATE

on the subject of

REAUTHORIZATION OF THE  
OFFICE OF FEDERAL PROCUREMENT POLICY

March 9, 1979



Mr. Chairman and Members of the Subcommittee:

I am George M. Coburn, Chairman of the Section of Public Contract Law of the American Bar Association. With me are Kevin Driscoll of the ABA Governmental Relations Office and O.S. Hiestand and Robert D. Wallick who are prominent among the leaders of our Section. As you know, Mr. Hiestand was the general counsel to the Commission on Government Procurement and he and Bob Wallick have closely monitored the progress of the Office of Federal Procurement Policy (OFPP) established by Public Law 93-400.

By designation of President Tate we appear before you to express the strong support of the American Bar Association for the reauthorization of the Office of Federal Procurement Policy for another five years. We think the record so far achieved by OFPP since August 30, 1974 should meet the initial expectations of the framers of Public Law 93-400, and we salute the strong and effective leadership of Hugh Witt and Lester Fettig for having made an impressive and conscientious start. But as I think they would be the first to say, the OFPP has just begun to take hold and most of its opportunities for achievement are yet to come.

We last appeared before you on November 14, 1973, again on behalf of the American Bar Association, and again in strong support of the bill that, with modifications, became Public Law 93-400.

The One-Sidedness of Procurement  
Policies and Specifications

At that time we expressed two principal concerns about the proposed legislation. We questioned whether the proposed organizational structure was adequate to the vast procurement policy responsibility to be vested in the Administrator; and we specifically urged that provision be made for the Administrator to have authority to regulate the extent to which the development or revision of procurement specifications should be made subject to an effective method of soliciting the viewpoints of interested parties.

Underlying each of these concerns was the perceived need to redress the one-sidedness of many government procurement policies and specifications that favor the government's economic interests as a buyer at the expense of fair dealing and equitable relationships among the parties in government contracting. We pointed out that there are many examples of this one-sidedness in pricing policies, in contract clauses putting unreasonable risk and regulation

on contractors, in so-called anti-claims clauses, in specifications restrictive of reasonable competition, and so forth. We called attention to a then recent article by Herman M. Braude and John Lane, Jr. in the Spring 1972 Federal Bar Journal that well articulated the inherent conflict of interest between the government's interest in promoting fair dealing and equitable relationships among the parties in government contracting and the government's economic or proprietary interest in maximizing the dollar return on its procurement appropriations. Let me here repeat what Messrs. Braude and Lane concluded:

"In summary, unlike other administrative regulations, procurement regulations as currently developed represent an inherent conflict of interest. The heart of the matter is money. In drafting procurement regulations and especially the boilerplate clauses to be required by regulation, the basic motivation of the Government (though not in all cases the only one) is to conserve appropriations rather than to act for the public good. In the short run these two goals may coincide, but there is a serious question whether they coincide in the long run, or even whether they necessarily coincide in the short run.

"Thus, there is not only the possibility of but the motive for arbitrary administrative practice in issuance of procurement regulations; and some limited examples of such abuse have been noted recently." Braude and Lane, Modern Insights on Validity and Force and Effect of Procurement Regulations -- a New Slant on Standing and the Christian Doctrine, 31 Fed. B.J. 99, 122-24 (1972) (Emphasis in original; footnotes omitted.)



Consideration of a Policy Board or  
Commission as a More Effective Structure  
for Making Acquisition Policy

Let me also repeat a part of what we said here before about a major purpose of the OFPP legislation being to redress this one-sidedness in the formulation of procurement policy:

"Our concern is that the proposed legislation may not achieve those fundamental reforms. Specifically, we question whether the proposed Administrator and his Deputy would have the time to give the necessary personal attention and consideration to grasp and fairly resolve, amidst growing administrative routine, the competing claims of affected interests on significant and often difficult procurement policy issues. And this need for the exercise of independent personal judgment in the light of the opposing considerations may be too much of a policy formulation burden to place on two men, no matter how highly they may be qualified and motivated, and no matter how competent the help they have from the professional staff. \*/

"We therefore ask that you also give careful consideration to the concept of legislating the establishment of a regulatory Board or Commission in the Executive Branch as an alternative to the proposed Office of Federal Procurement Policy. Such a Federal Procurement Policy Board or Commission could have three to five members for fixed and staggered terms, appointed by the President and by and with the advice of the Senate. The members could

---

\*/ The ASPR Committee has 9 members, for whom the ASPR work is largely a full-time job. In addition, much of the initial ASPR work is done by a large number of standing or ad hoc subcommittees.

represent the principal interests concerned in formulation of procurement policy -- big business, small business, the construction industry, the Department of Defense or other dominant Government procurement interest, and hopefully a disinterested member representing solely the public interest. Such a Board or Commission would of course have an appropriate professional staff and would discharge the functions otherwise committed to the proposed Office of Federal Procurement Policy by S.2510. We are talking about a very large function and we think it unrealistic to suppose, as some witnesses have suggested, that the job can be done by a handful of specialists.

"When you consider the vast economic impact of federal procurement policies and their effect on national employment with the swings in procurement awards and cutbacks, with the tendencies to concentration of large awards geographically in a few states and in a handful of major corporations; when you consider the low dollar percentage of procurement by competitive bidding and the small potatoes for small and minority business; when you consider the economic dislocations resulting from contract terminations -- it becomes obvious that there is much vitally important work of procurement policy formulation or revision in these areas that such a Board or Commission should undertake in the public interest. And it seems plain that the interests at stake at least match the economic interests affected by the regulation of business in the public interest we associate with the customary work of the several regulatory agencies. Added to this of course is the whole matter of the procurement terms on which the Government buys and about which we have heard so many complaints of unfairness and one-sidedness."

We submit that the experience of OFPP probably confirms that any Administrator is able to devote his personal attention only to the most major questions of procurement policy and then at a level of consideration that tends to be less than thorough. In our view, there is no way for him to find the time effectively to do much more.

The question we pose is whether a policy board or commission would be a more effective structure to achieve over the long term the needed reforms and objectives of federal procurement stated in the Declaration of Policy of Public Law 93-400. Such a policy board by representing the affected governmental, private and public interests would formulate procurement or acquisition policy in a manner that would accommodate and determine the competing interests and considerations. It would be supported by an executive director and a professional staff. The functions of this policy board would differ from those of the regulatory agencies in that a major purpose of the policy board would be to develop acquisition policies and contract clauses that would facilitate fair dealing and equitable relationships among the parties in government contracting so as to encourage the best of American industry to compete for government procurement.



We think that in the reauthorization of OFPP Congress should mandate a study of the establishment of such a policy board or commission by the Office of Management and Budget or by the Administrative Conference over a two-year period and provide appropriate funding and staff to carry out such a study and report to Congress.

Strengthening the Opportunity for  
Outside Participation in the De-  
velopment of Acquisition Policy

At the heart of the difficulty of redressing the one-sidedness of federal procurement or acquisition policy and the terms of government contracts is the absence of a meaningful opportunity for interested or affected outside groups to participate at the inception of policy or contract clause formulation. We all know that by the time a matter is published for 30 to 60 days of public comment in the Federal Register the die is largely cast. As it is, the comments are for the most part considered by the proponents of the particular policy or clause. Often the proponents have already compromised on some issues in the internal debates and have become dedicated to their proposal. The public commentators are viewed as critics who lack understanding of the problem. In other words, we believe the public comment opportunity as presently structured is largely a formality or gesture that does not achieve its intended purpose of developing procurement or acquisition policy that reflects fair dealing and equitable relationships.

One way to overcome this difficulty, at least for the interim, may be for the reauthorization legislation to strengthen the authority of the Administrator to utilize outside help and advice, and to provide the money to do this.

Let me provide an example of how this could be done. As Mr. Fettig has told you, the major project of his office at the present time is the development and publication of a single, government-wide procurement or acquisition regulation, to be known as the "Federal Acquisition Regulation." This is a very worthwhile project. The problem with it is that it is being written almost entirely by personnel of the Department of Defense and the General Services Administration with no opportunity for outside input prior to publication for public comment in the Federal Register. It is therefore not surprising that by and large what has already been published for public comment is largely a restatement of the current DOD and GSA policies notwithstanding the well-intentioned commitment to a "zero-based" reconsideration of these policies.

What might have been done instead, had the authority and funding been made available, would have been for the Administrator to appoint an advisory committee or committees, to accept voluntary and uncompensated services, and to employ experts and consultants, from outside the

executive branch and representative of the affected private and public groups to reevaluate and assess the fairness and the effectiveness of the existing procurement regulations and contract clauses, and to make recommendations to the Administrator for retention, revision or repeal. An advisory committee consisting of government and non-government people would provide the basis for initial interfaces regarding different points of view and the opportunity to develop objective and equitable policy positions. As you know, this was the approach used for both the Commission on Government Procurement, and its study groups and staff. The fact that the COGP recommendations have received widespread acceptance demonstrates the value of this approach to formulating public procurement policies.

We note that Section 7(a) of S.2510, 93rd Congress, which in major part became Public Law 93-400, conferred specific authority in these areas, and we suggest that you consider the restoration of that authority in the reauthorization legislation for OFPP. We are of course aware of the requirements of the Federal Advisory Committee Act of 1972, Public Law 92-463, as amended, 5 U.S.C. App. I, and we do not suggest that the proposed appointment and use of advisory committees by the Administrator not fully comply with that Act. Without explicit authorization and the provision of appropriate funding, however, we doubt



that the procedures for "soliciting the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms" would be effective and timely within the contemplation of Section 6(d)(2) of Public Law 93-400.

Providing the Opportunity for Outside  
Participation in the Development of  
Specifications for Competitive Procurement

As already indicated, in our prior testimony we were concerned that the law make provision for public participation in the development of specifications for competitive procurement. Because no such provision was made in Public Law 93-400 and because we continue to believe that this should be done, please permit me to repeat some of what we said before:

"... As a minimum, we suggest that the new agency should have authority to regulate the extent to which the development or revision of procurement specifications, as with procurement policies, regulations, procedures, and forms, should be made subject to an effective method of soliciting the viewpoints of interested parties. We are not aware of any widespread or institutionalized practice of industry consultation in this respect, and we are aware of the many protests to the Comptroller General complaining of specifications restrictive of competition on the one hand or in violation of patent or trade secret rights on the other. Likewise, we are mindful of the many contract disputes involving issues of defective Government specifications. In addition, we believe that the new agency should at least have some means of insuring that procurement specifications comply with the procurement

policies of the agency. It would thus seem that the area of specifications would be one for the new agency and the public to get into to a limited extent if these kinds of problems are to be resolved more satisfactorily and with greater public confidence in the fairness and openness of the Federal procurement process."

This suggestion could easily be carried out by amending Section 6(d)(2) to add "specifications" at the end of the items there enumerated for the solicitation of the views of interested parties in the development thereof.

#### Public Explanation of the Choices Made

In concluding our statement, Mr. Chairman, we again revert to a suggestion we made before, namely that the legislation would strengthen public acceptability and consent if the Administrator or other policy maker was ordinarily called upon to publish a statement of the considerations that led to the adoption of the particular policy, clause or specification in the light of the competing arguments or views. We quoted Judge Harold Leventhal, as follows:

"John Adams once said: 'If indeed there is no rule, no standard, all must be accident and change. If there is a standard, what is it?' My personal experience with businessmen in government during World War II and the Korean conflict recalls their insistence that their judgment rested solely on intuition. It happens that we were governed by maximum price legislation, which required that our regulations be accompanied not by findings

but at least by a 'statement of considerations'. That was a useful discipline, and it usually turned out that the considerations could be probed and stated rationally. Perhaps that would be the beginning of wisdom here -- to require a statement of the considerations in case of action with such huge public consequences as termination orders, even though calling for extensive judgment on the part of officials in the procurement system. \*/

Here again we think the reauthorization legislation would strengthen public confidence in the public participation process if Section 6(d)(2) was further amended to provide at the end: "and for the publication of a statement of the considerations supporting adoption of particular procurement policies, regulations, procedures, forms, and specifications."

That concludes our statement, Mr. Chairman. My colleagues and I will be happy to try to answer any questions you may have.

---

\*/ Leventhal, Public Contracts and Administrative Law, 52 A.B.A.J. 35, 40-41 (1966) (Footnote omitted.)



Section of Public Contract Law  
August, 1976

*Be It Resolved*, That the American Bar Association endorses in principle the concepts and goals expressed in S. 3005, entitled the Federal Acquisition Act of 1976, and tenders the assistance of the Section of Public Contract Law to the appropriate committees of Congress for the final formulation thereof.

5-4-79-Orig. to L & N S (EH) for response.

**COFPAES**  
**COMMITTEE ON**  
**FEDERAL PROCUREMENT OF**  
**ARCHITECTURAL/ENGINEERING**  
**SERVICES**

May 3, 1979

Honorable Jack Brooks  
 Chairman  
 Committee on Government Operations  
 U.S. House of Representatives  
 Washington, D. C. 20515

RECEIVED

MAY 4 1979

Legislation and National  
 Security Subcommittee

RE: H.R. 3763, Office of Federal Procurement Policy Act Amendments of 1979

Dear Mr. Chairman:

On behalf of the American Consulting Engineers Council, American Institute of Architects, American Society of Civil Engineers, ARTBA Planning and Design Division and the National Society of Professional Engineers, the Committee on Federal Procurement of Architectural/Engineering Services (COFPAES) would like to express support for H.R. 3763 which reauthorizes OFPP and redirects the Office's authority and functions over the next three years.

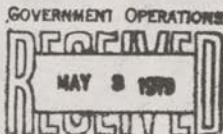
We particularly appreciate and applaud your direction to OFPP that it should develop "standard contracts and contract language in order to reduce the government's cost of procuring goods and services as well as the private sector's cost of doing business with the government ..." Unfortunately, the costs of completing Federal A/E assignments are greater than for comparable private work. Eliminating unnecessary costs associated with government work is an especially worthwhile goal in these inflationary times.

Thank you for considering our views.

Sincerely,

*Richard H. Stanley*

Richard H. Stanley  
 Chairman



RHS:bc

Please reply to: 475 L'Enfant Plaza, S.W.  
 Suite 2450  
 Washington, D. C. 20024

## AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.

1725 DE SALES STREET, N.W., WASHINGTON, D. C. 20036 TEL. 347-2315

OFFICE OF THE PRESIDENT

RECEIVED

MAY 14 1979

Legislation and National  
Security Subcommittees

May 9, 1979

The Honorable Jack Brooks  
Chairman  
Subcommittee on Legislation and National Security  
Committee on Government Operations  
U. S. House of Representatives  
2157 Rayburn House Office Building  
Washington, D. C. 20515

Dear Mr. Chairman:

On behalf of the nation's major producers of aircraft, spacecraft, missiles and related components, equipment and services, the Aerospace Industries Association of America, Inc., welcomes this opportunity to express its views on H. R. 3763 for the record of your Subcommittee's recent hearings on the Office of Federal Procurement Policy (OFPP). Over the years, our member companies have gained significant experience in furnishing goods and services to the government. It is in the light of those experiences that we respectfully urge that the subject legislation not be passed.

We strongly support the OFPP as presently constituted and have done so since such a body was proposed by the Commission on Government Procurement and established by the Congress. Recently, we reiterated this support before the Senate Subcommittee on Federal Spending Practices and Open Government. In supporting the OFPP on that occasion, we stated that we felt it had fulfilled ably the purpose for which it was created by Congress, namely, "...to provide overall direction of procurement, policies, regulations, procedures and forms for executive agencies..." In particular, we applaud OFPP projects relating to OMB Circular A-109, dealing with major systems acquisition; OMB Circular A-76, pertaining to acquiring products and services from the private sector for government use; and efforts aimed at simplifying the federal acquisition process in general.

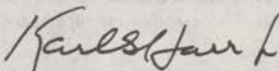
We note that the latter is also a priority of yours, Mr. Chairman, as it has been of various members of the other Congressional body. In fact, while we do not fully support the Senate legislation for consolidation of the procurement processes as it is presently written, we recognize that enactment of a uniform federal acquisition statute is an on-going legislative project and feel it would be inappropriate to remand it to the OFPP for further study and resolution at this juncture.



In short, while we as manufacturers have not always agreed with everything the OFPP has done, we feel it has a worthwhile role to play and is deserving of the support of those interested in improving and reshaping the nation's procurement policies.

Thank you for considering our views.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Karl G. Harr, Jr.", with a stylized flourish at the end.

Karl G. Harr, Jr.



## **associated builders and contractors, inc.**

SUITE 409 • 444 NORTH CAPITOL STREET N.W. • WASHINGTON, D.C. 20001 • PHONE Area Code 202-637-8800

STATEMENT OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC.

TO

THE SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

OF THE

HOUSE COMMITTEE ON GOVERNMENT OPERATION

MAY 7, 1979

The Associated Builders and Contractors, Inc. (ABC) appreciates the opportunity to comment on the performance of the Office of Federal Procurement Policy (OFPP) during the committee's consideration of reauthorization legislation. ABC is a national association of over 12,500 construction contractors, subcontractors, suppliers and associates who promote the Merit Shop philosophy, a concept which calls for an open competitive marketplace where contracts are awarded to the lowest responsible bidder.

Because of the large number of ABC members involved in federally funded or assisted construction projects throughout the country, ABC is particularly interested in matters concerning the federal procurement process and supports the efforts of the OFPP to improve that process. ABC believes the performance of the OFPP to date has been very good and urges this Subcommittee to approve reauthorization legislation which will permit the OFPP to continue with those efforts.

Perhaps the greatest costs incurred by our members in bidding and performing federal contracts results from the maze of federal regulations with which they must comply. Procurement regulations often needlessly vary from agency to agency thereby increasing the cost of compliance, since contractors must change procedures from contract to contract. The current work of the OFPP to establish a single Federal Acquisition Regulation to replace these redundant and sometimes conflicting regulations, and the OFPP efforts to establish uniform governmental procurement policies, will therefore lead to a substantial reduction of the current administrative burden to federal contractors. ABC believes this reduction will result in cost savings to the federal government which will more than offset future appropriations.

ABC is therefore greatly troubled by proposals to limit the authority of the OFPP in procurement matter. If that authority is limited, as has been suggested, ABC members will again be faced with a maze of different procurement policies. Some agencies may rely on advisory opinions of the OFPP, while others will ignore those opinions. For each agency, a different set of policies will be enforced. The progress made to date will be lost and federal procurement administration revert to the state of confusion which was the stimulus for creating the office in the first instance.

ABC believes that the authority of the OFPP in the federal procurement process should be clarified and strengthened, rather than reduced. For example, ABC would urge the Subcommittee to propose reauthorization legislation which would establish OFPP as the final authority for disputes over the appropriate labor standards laws applicable on federal contracts. As the office responsible for establishing overall federal procurement policy, OFPP would be best suited for assuring consistent, non-partial application of prevailing wage laws.



ABC would also like to suggest that any reauthorizing legislation direct the OFPP to expand its current directory of minority owned media outlets, production companies and advertising agencies compiled and published last year in the Federal Register, to include other types of minority business enterprises. This would greatly enhance the Executive and Congressional mandates to increase minority participation in government procurement, by providing agencies and contractors with names of such firms. One of the greatest problems our membership encounters in attempting to comply with minority subcontracting provisions in federally funded or assisted construction contracts is locating qualified minority firms. Directing the OFPP to compile a source list of such contractors for use by procuring agencies would greatly augment the amount of minority contracting with the federal government.

Again, ABC appreciates this opportunity to comment on the upcoming evaluation of the OFPP, and urges the Subcommittee to continue this agency with its current level of authority.

Mr. BROOKS. The subcommittee is adjourned.  
[Whereupon, at 10:55 a.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]



